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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 654

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, ET AL., ETC., PETITIONERS,

vs.

THE WOOD PRESERVING CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 21, 1940.

CERTIORARI GRANTED FEBRUARY 3, 1941.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 654

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, ET AL.,

Petitioners,

vs.

THE WOOD PRESERVING CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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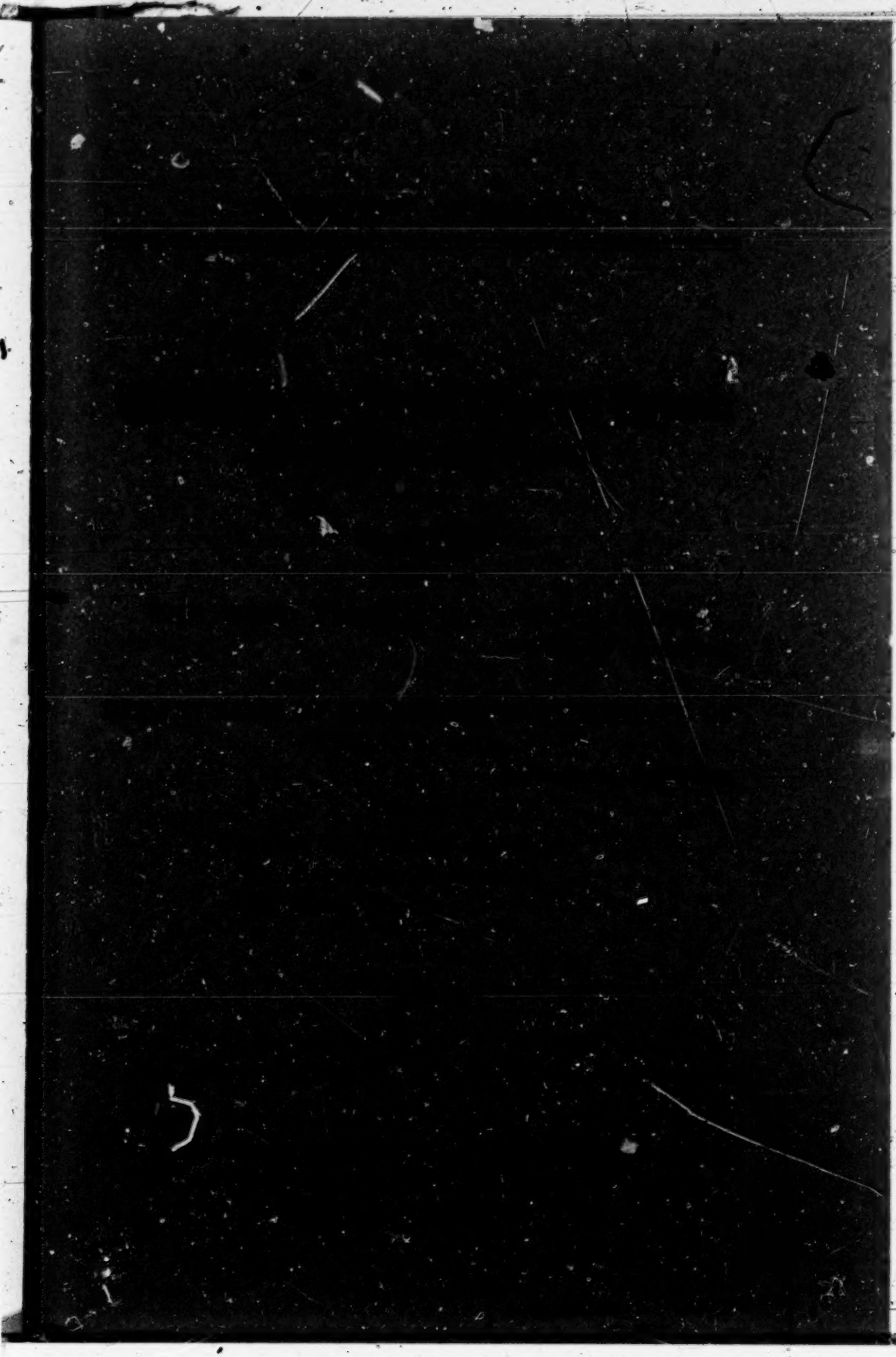

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IN THE

United States Circuit Court of Appeals
For the Seventh Circuit

No. 7126

THE WOOD PRESERVING CORPORATION,
Plaintiff-Appellant,

vs.

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, ET AL.,
Defendants-Appellees.

Counsel for Plaintiff-Appellant:
MR. FREDERICK E. MATSON,
MR. HARRY T. ICE.

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

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1 Pleas of the District Court of the United States for the Southern District of Indiana, at the United States Court House in the City of Indianapolis, in said District, before the Honorable Robert C. Baltzell, Judge of said District Court. Placita.

The Wood Preserving Corporation
vs.
Department of Treasury of the State of Indiana, *et al.* } #8 Civil.

Be It Remembered that heretofore towit: at the May Term of said Court, on the 18th day of October, 1938, before the Honorable Robert C. Baltzell, Judge of said Court, the following proceedings in the above cause were had, towit:

Comes now the plaintiff by its attorneys, and files complaint, which is as follows:

Filed Oct. 18, 1938. 2

IN THE DISTRICT COURT OF THE UNITED STATES

For the Southern District of Indiana,

Indianapolis Division.

The Wood Preserving Corporation, *Plaintiff,*

vs.

Department of Treasury of the State of Indiana, M. Clifford Townsend, Peter F. Hein, Lawrence F. Sullivan, as and constituting the Board of Department of Treasury of the State of Indiana, *Defendants.*

No. 8 Civil.

COMPLAINT.

Comes now the plaintiff and complains of the defendants, and for cause of action alleges that:

1. Jurisdiction is founded upon diversity of citizenship and amount. Plaintiff is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at Pittsburgh in the State of Pennsylvania. Defendant, Department of Treasury of the State of Indiana, is an Executive Department of the State of Indiana vested with the enforcement and application, through an administrative division known as the Gross Income Tax Division, of the Indiana Gross Income Tax Act of 1933 (Chapter 50, Acts of 1933), as amended by the Acts of 1937 (Chapter 117, Acts of 1937). Defendants, M. Clifford Townsend, Peter F. Hein and Lawrence F. Sullivan, are each citizens and residents of the State of Indiana and of the County of Marion, and together constitute the Board of Department of Treasury of the State of Indiana. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00).

2. Jurisdiction is also founded on the existence of a federal question and amount in controversy. The additional tax sought to be recovered is alleged to have been illegally assessed under Article I, Section 8 of the Con-

stitution of the United States and Amendment 14 of
3 the Constitution of the United States, and the matter in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars ($3,000.00).

3. On or about the 5th day of August, 1937, there was assessed against the plaintiff an additional gross income tax, together with interest, for the year 1934 in the amount of Two Thousand Four Hundred Forty-four Dollars and Seventy-nine Cents ($2,444.79), for the year 1935 in the amount of One Thousand Eight Hundred Seventy-six Dollars and Forty-one Cents ($1,876.41) and for the year 1936 in the amount of Two Thousand One Hundred Twenty-one Dollars and Twenty-seven Cents ($2,121.27), making a total of Six Thousand Four Hundred Forty-two Dollars and Forty-seven Cents ($6,442.47). The additional tax was assessed against the plaintiff on receipts of the plaintiff arising from transactions which are hereinafter more particularly described.

4. Thereafter, within the time allowed by law, and on or about the 21st day of October, 1937, plaintiff, on forms prescribed by the defendant Department of Treasury, filed a statement for refund of the tax assessed for each year, with the Department of Treasury, Gross Income Tax Division. Accompanying said statement for refund and incorporated as a part thereof was a petition for refund of the tax paid in which there was set forth at length the facts constituting the ground of plaintiff's objections to the assessment of the additional tax. After a hearing before the Gross Income Tax Division, and on the 18th day of August, 1938, the plaintiff, through the Department of Treasury, Gross Income Tax Division, was advised that plaintiff's statements and petitions for refund of taxes paid for each of the years in the amounts above stated were disallowed and the refund denied. The defendants have wholly refused to pay to the plaintiff any portion or all of the tax so paid for each of the years.

4 5. The receipts upon which the additional tax for each of the years was assessed arose out of the following course of transactions:

The receipts of plaintiff were from the Baltimore and Ohio Railroad Company (hereinafter referred to as "the Railroad"), received as payment for treated cross-ties sold by plaintiff to the Railroad. Raw (untreated) cross-ties so sold were delivered along the right-of-way of the Railroad in the State of Indiana, and were there inspected by agents of the plaintiff and of the Railroad and placed

f.o.b. on cars of the Railroad pursuant to the terms and conditions of a certain contract between the Railroad and the plaintiff. Under said contract, and pursuant to an understanding with the Railroad, a portion of the raw cross-ties were immediately carried by the Railroad to a creosoting plant of the plaintiff located at Green Spring, West Virginia, which plant was leased by the Railroad to the plaintiff under said contract, and said ties were there subjected by plaintiff to a treating process and re-delivered to the Railroad at Green Spring, West Virginia, and ultimately used by the Railroad throughout the several States in which it operates. All of the balance of such raw cross-ties were carried by the Railroad to a creosoting plant at Finney, Ohio, owned and operated by National Lumber & Creosoting Company, one of plaintiff's subsidiary corporations, and were there subjected to a treating process and redelivered to the Railroad at Finney, Ohio, and ultimately used by the Railroad throughout the several States in which it operates. The raw ties so delivered by the plaintiff and loaded on cars of the Railroad along the lines of the right-of-way of the Railroad within the State of Indiana, were as aforesaid inspected at the point of delivery by agents of plaintiff and of the Railroad and were accepted as of suitable grade and quality. Copies of the inspection reports of the agents of the Railroad were forwarded immediately to the office of the plaintiff at Marietta, Ohio, and there an invoice addressed to the Railroad was prepared by plaintiff and sent to the principal office of the Railroad at Baltimore, Maryland. Duplicate copies of the invoice were forwarded to the principal office of plaintiff at Pittsburgh, Pennsylvania. All invoices were at unit prices for treated ties f.o.b. cars at the originating points. All payments to the plaintiff were made by bank drafts drawn on Pittsburgh banks for such invoices and deposited then in Pittsburgh banks. All bookkeeping transactions, other than those stated, were carried on at Pittsburgh by the plaintiff. Plaintiff in none of the years in question had an office of any kind in the State of Indiana, kept no books in Indiana, received no funds in Indiana, and all agents of plaintiff worked out of plaintiff's Pittsburgh office.

6. Plaintiff has been improperly charged with the tax herein referred to and has been required to pay the same, and is entitled to recover the amount so improperly collected for the reason:

(a) That the receipts from the transactions aforesaid,

upon which the tax for the years in question was based, are receipts derived from business conducted in commerce between this State and other States of the United States, which under the terms and provisions of Section 6(a) of the Gross Income Tax Act of Indiana is exempt from taxation (Section 6(a), Chapter 50, Acts of 1933; Section 6(a), Chapter 117 of the Acts of 1937).

(b) That if said receipts are not exempt under the provisions of Section 6(a) of said Act, then said Act is invalid and void and said assessment illegal as to the tax on such receipts for the reason that the tax assessed constitutes a regulation of and a burden upon commerce between the State of Indiana and other States of the United States, in conflict with Article I, Section 8 of the Constitution of the United States.

(c) That plaintiff's receipts or proceeds from such transactions are not received in the State of Indiana,
6 and do not constitute receipts subject to provisions and terms of the aforesaid Gross Income Tax Act.

(d) That if said Act be construed to permit the State of Indiana to tax receipts not received within the State, then said Act as to the tax on such receipts is illegal and void for the reason that it is in conflict with the 14th Amendment of the Constitution of the United States in that it deprives the plaintiff of property without due process of law.

Wherefore plaintiff prays judgment against the defendants in the amount of Six Thousand Four Hundred Forty-two Dollars and Forty-seven Cents ($6,442.47), together with interest thereon from the date of payment; and for all other proper relief in the premises.

(Signed) Frederick E. Matson,
(Signed) Harry T. Ice,
Attorneys for Plaintiff.

Matson, Ross, McGord & Clifford,
951 Consolidated Building,
Indianapolis, Indiana,
Of Counsel.

7 (Further entry for October 18, 1938.)

And thereupon there issued out of the office of the Clerk of this Court, a writ of summons to the United States Marshal, for said defendants.

And afterwards towit at the November Term of said Court, on the 7th day of November, 1938, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, towit:

Come now the defendants by their attorneys, and file answer, which is as follows:

Filed Nov. 7, 1938.

IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—8) * *

ANSWER.

Come now the defendants Department of Treasury of the State of Indiana, M. Clifford Townsend, Peter F. Hein, Laurence F. Sullivan, as and constituting the Board of Department of Treasury of the State of Indiana, and for answer to the plaintiff's complaint herein state:

1. The defendants admit so much of the paragraph designated as "1" of the plaintiff's complaint as alleges that the jurisdiction is founded upon diversity of citizenship and amount, that the plaintiff is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at Pittsburgh in the State of Pennsylvania, and further that the defendant Department of Treasury of the State of Indiana is an executive department of the State of Indiana vested with the enforcement and application, through an administrative division known as the Gross Income Tax Division, of the Indiana Gross Income Tax Act of 1933 (Chapter 50, Acts of 1933) as amended by Chapter 117 of the Acts of 1937; and further that the defendants M. Clifford Townsend, Peter F. Hein and Laurence F. Sullivan are each citizens and residents of the State of Indiana and of the County of Marion, and that together they constitute the Board of the Department of Treasury of the State of Indiana and are made defendants in the present action in their official capacities as such of the Department of Treasury of the State of Indiana and not otherwise, and that the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00).

2. The defendants admit so much of the paragraph of the plaintiff's complaint designated as "2" as alleges that

jurisdiction is also founded on the existence of a claimed federal question and amount in controversy, and that the matter in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars ($3,000.00); but the defendants deny the allegation that the gross income taxes sought to be recovered in this action were illegally assessed in view of the provisions of Article I, Section 8 of the Constitution of the United States of America, and of Amendment 14 of the Constitution of the United States of America, and that the defendants specifically deny
11 that the gross income taxes sought to be recovered in this action were either erroneously, illegally, unlawfully or unconstitutionally assessed or collected.

3. The defendants admit so much of the paragraph of the plaintiff's complaint designated as "3" as alleges that on or about the fifth day of August 1937 the State of Indiana acting through its Department of Treasury of the State of Indiana assessed against the plaintiff an amount representing a gross income tax for the year of 1934 (which amount was in addition to the taxes previously paid by the plaintiff) and which amount, together with interest, was in the sum of two thousand four hundred forty-four dollars and seventy-nine cents ($2,444.79); further that on the same day the State of Indiana acting through its Department of Treasury of the State of Indiana assessed against the plaintiff gross income taxes for the year of 1935 in the amount of one thousand eight hundred seventy-six dollars and forty-one cents ($1,876.41); and further that the State of Indiana acting through its Department of Treasury of the State of Indiana assessed against the plaintiff herein gross income taxes for the year of 1936 in the amount of two thousand one hundred twenty-one dollars and twenty-seven cents ($2,121.27); but the defendants allege that the taxes assessed under the provisions of the Indiana Gross Income Tax Act are ordinarily collected upon the basis of an annual taxing period comprising the period from January first to December thirty-first inclusive of each year, and that the tax and any credits thereon are computed with regard to such annual taxing periods and not otherwise, and that in
12 no instance are periods in excess of one calendar year treated as a unit for the ascertainment or assessment of taxes under the Indiana Gross Income Tax Act and specifically that each calendar year has been treated as a separate distinct and independent taxing period with reference to the taxes assessed and collected from the

plaintiff in the present case; and the defendants and each of them further respectfully represent and show to the Court that no assessment was made against the plaintiff in this case, and that no amount is now in controversy with respect to the taxes due in any separate and individual annual taxing period mentioned in the plaintiff's complaint in which the amount collected and claimed to be due as a refund and presently in controversy, is in excess of the amounts hereinbefore set out for such individual annual taxing period.

The defendants further answering the plaintiff's complaint and particularly that part thereof designated as paragraph "3" say that they deny so much thereof as alleges that the additional tax was assessed against the plaintiff on receipts of the plaintiff arising from transactions thereinafter more particularly described, and allege that said additional tax was assessed against the plaintiff on receipts of the plaintiff arising from transactions as hereinafter particularly set out in this Answer.

4. The defendants admit so much of the paragraph designated as "4" of plaintiff's complaint as alleges that thereafter and within the time allowed by the statutes of the State of Indiana and particularly on or about the twenty-first day of October, 1937, the plaintiff filed a petition for refund of the tax assessed for each of the annual taxing periods specified in the foregoing paragraph and

13 that the plaintiff used the forms prescribed by the defendant Department of Treasury for such purpose, and that accompanying such statement or petition for refund and incorporated as a part thereof, there was set forth at length the ground of the plaintiff's objection to the assessment of the additional tax and the grounds upon which the plaintiff contended that it was entitled to a refund; that thereafter within the time allowed by the statutes of the State of Indiana, and particularly on or about the eighteenth day of August, 1938, the State of Indiana acting through its Department of Treasury of the State of Indiana, Gross Income Tax Division, advised the plaintiff that the plaintiff's petition for refund of taxes paid for each of the annual taxing periods specified in the foregoing numbered literary paragraph were disallowed, and the refund denied; it is further admitted by the defendants that the State of Indiana has not, at any time, refunded the gross income taxes in question and that the State of Indiana acting through its Department of Treas-

ury of the State of Indiana, Gross Income Tax Division, has refused to make such a refund to the plaintiff.

5(a). The defendants further answering the complaint say that they admit so much of the paragraph designated "5" in said complaint as alleges that the gross income by virtue of which the tax for each of the annual taxing periods alleged in the complaint arose out of the transactions therein set out insofar as it is alleged that the receipts of the plaintiff were from the Baltimore and Ohio Railroad Company thereinafter referred to as the "railroad" (except that some of the receipts involved were from other railroad companies) and were received as payment for cross-ties sold by the plaintiff to the railroad company,

but said defendants deny that said taxes were upon
14 such receipts and further deny that said receipts were payment for treated cross-ties and allege that said tax was measured by such receipts and that the only receipts involved in the assessment were on account of receipts for untreated cross-ties.

Said defendants further admit so much of said paragraph numbered "5" of the complaint herein as alleges that raw untreated cross-ties so sold by the plaintiff to the railroad company were delivered along the right-of-way of the railroad in the State of Indiana and were there inspected by agents of the plaintiff and of the railroad and placed on cars of the railroad pursuant to the terms and conditions of a certain contract between the railroad and the plaintiff, and said defendants admit so much of said paragraph numbered "5" of the complaint as alleges that under said contract with the railroad company a portion of the raw cross-ties were carried by the railroad to a creosoting plant of the plaintiff located at Green Springs, West Virginia, but said defendants allege that said contract was in writing; that it has no knowledge of any understanding other than as contained in said written contract and that it has no knowledge as to whether said creosoting plant was leased by the railroad to the plaintiff or not. Said defendants further say that they admit so much of said paragraph "5" as alleges that said ties wer subjected by the plaintiff to a treating process and that thereafter they were placed in custody of the railroad company at Green Springs, West Virginia, and ultimately used by the railroad throughout the several states in which it operates, but the defendants deny that any part of the gross income which was used as a measure for the additional assessments as herein alleged were

for the creosoting of said ties and allege specifically
15 that said income so used as a measure was on account of the sale by the plaintiff and the delivery by the plaintiff to the railroad company upon its right-of-way in the State of Indiana of said untreated cross-ties.

Said defendants further answering said paragraph "5" of the complaint admit so much of said paragraph "5" as alleges that all of the balance of such raw cross-ties were carried by the railroad to a creosoting plant at Finney, Ohio, owned and operated by National Lumber and Creosoting Company, one of plaintiff's subsidiary corporations, and were there subjected to a treating process after which the same were put in custody of the railroad at Finney, Ohio, and ultimately used by the railroad throughout the several states in which it operates, but said defendants deny that any part of the gross income forming the measure of the additional tax was on account of the creosoting of said ties at the plant at Finney, Ohio, or at any other plant of the plaintiff. Said defendants further admit so much of said paragraph "5" as alleges that the raw ties including those afterwards carried to Green Springs, West Virginia, and those carried to Finney, Ohio, and delivered by the plaintiff to the railroad company and loaded on cars along the lines of the right-of-way of the railroad in the State of Indiana, were inspected at the point of delivery in the State of Indiana by agents of the plaintiff and of the railroad and were accepted as of suitable grade and quality, but the defendants deny any inference which may be drawn therefrom that said raw untreated ties were not purchased by said railroad company in Indiana, and allege that said cross-ties in their natural state were purchased by the plaintiff from farmers and other producers of such
16 cross-ties located within the State of Indiana and that such raw or untreated cross-ties were sold by the plaintiff to the Baltimore and Ohio Railroad Company and to other railroad companies and that same were delivered by the producer to the plaintiff upon the right-of-way of the particular railroad company to which the cross-ties had been sold in the State of Indiana and that after the same were inspected and graded by agents of the plaintiff and by agents of the respective railroad companies, the agent of the railroad company to whom such untreated cross-ties had been sold accepted the ties on behalf of the railroad company in the State of Indiana and on the right-of-way of the said railroad company's

right-of-way in the State of Indiana; and defendants allege further that the plaintiff was not obliged by virtue of its contract of sale with the several railroad companies to deliver said cross-ties to any other point and was not obliged to deliver the untreated cross-ties across any state line to the railroad company purchasing such cross-ties.

5(b). With reference to so much of the allegations of paragraph "5" of the plaintiff's complaint either admitted or denied in this paragraph (i. e. 5 (b)) of defendants' "Answer", the defendants specifically deny that the facts alleged in paragraph "5" of the plaintiff's complaint and here answered were a "course of transactions" (or any part thereof) giving rise to the receipts by reason of which the gross income taxes for the annual taxing periods in question were assessed and the defendants deny that such facts are in any manner material to the accuracy, legality or constitutionality of such assessments.

Subject to the limitations stated the defendants admit so much of the paragraph designated "5" of the
17 plaintiff's complaint as alleges that after the cross-ties were delivered by the plaintiff to the railroad on the railroad company's right-of-way within the State of Indiana and after the acceptance by the railroad company of such delivery of the product sold, the respective railroad companies did, as already alleged herein, in some instances, place the raw or untreated cross-ties as the property of the railroad company on cars owned or controlled by the railroad company and that the railroad company did then transport such property to states other than the State of Indiana, and that a portion of the raw cross-ties were so transported by the respective railroad companies to a creosoting processing plant belonging to or under the control of the plaintiff located at Green Springs, West Virginia, which plant was allegedly leased by the railroad company to the plaintiff, and that the said raw and untreated cross-ties were then placed by the railroad company in the custody of the plaintiff for the sole purpose of permitting the plaintiff to subject the cross-ties to a creosoting treating process and that the said cross-ties were, after they had been subjected to this creosoting process, returned by the plaintiff to the physical custody, control and possession of the railroad at Green Springs, West Virginia, and were ultimately used by the railroad throughout the several states in which it operates, including the states of Indiana and of West Virginia; that a portion of the raw and untreated cross-ties sold and de-

livered to the railroad company and accepted by the railroad company along its right-of-way within the State of Indiana were, after such delivery and acceptance, placed upon the railroad cars controlled by the railroad company as the property of the railroad company and were carried by the railroad to a certain creosoting processing
18 plant located at Finney, Ohio, which plant was owned and operated by the National Lumber and Creosoting Company, which company is one of the plaintiff's subsidiary corporations, and such raw and untreated cross-ties were then placed by the railroad in the custody of the National Lumber and Creosoting Company for the sole purpose of being subjected to a treating process, that after such treating process was completed the cross-ties in their treated state were returned to the custody, control and possession of the railroad on the railroad company's right-of-way at Finney, Ohio, and that such treated cross-ties were ultimately used by the railroad throughout the several states in which it operates, including both the states of Indiana and Ohio; that the raw and untreated cross-ties were inspected at the point of delivery of such raw and untreated cross-ties within the State of Indiana by agents of the plaintiff and agents of the railroad and were accepted as of suitable grade and quality by the agents of the railroad, and further that copies of the inspection reports of the agents of the railroad were forwarded immediately to an office maintained by the plaintiff at Marietta, Ohio, pursuant to the directions of the plaintiff and that there was prepared in the office of the plaintiff at Marietta, Ohio, an invoice addressed to the railroad and sent to the principal accounting office of the railroad or to the address designated by the purchasing railroad and that duplicate copies of the invoices prepared by the plaintiff were forwarded to the principal office of the plaintiff maintained at Pittsburgh, Pennsylvania. But the defendants deny that the charge for such raw and untreated cross-ties reflected in said invoices were at unit prices for treated ties f. o. b. on cars at the
19 originating point and the defendants allege that the only receipts of the plaintiff by reason of which the gross income tax was assessed for the annual taxing periods in question was gross income received in payment for the sale and delivery by the plaintiff of raw and untreated cross-ties to the railroad.

Subject to the qualifications and restrictions heretofore set forth the defendants admit so much of paragraph "5"

of the plaintiff's complaint as alleges that the plaintiff required railroads to make all payments to the plaintiff by bank drafts drawn on Pittsburgh banks and that the payment was made by the railroad to the plaintiff at Pittsburgh, Pennsylvania, at the direction of the plaintiff; that the plaintiff voluntarily chose to carry on the major part of the bookkeeping transactions involved in the sale of raw and untreated cross-ties at Pittsburgh, Pennsylvania, but the defendants deny that the "plaintiff in none of the years in question * * kept no books in Indiana", and allege that some records were kept by plaintiff's agents in Indiana during the taxing periods in question; further the defendants deny the allegation that "plaintiff in none of the years in question had an office of any kind in the State of Indiana" and the defendants further allege that while the plaintiff may not have, during any of the annual taxing periods in question, maintained a formal office within the State of Indiana the plaintiff did have such offices within the state as were maintained by the duly authorized agents of the plaintiff in railroad cars or equipment placed on the sidings or along the right-of-way of various railroad companies within the State of Indiana which offices were railroad rolling equipment and were moved from place to place as the needs of the plaintiff's business required and that the plaintiff had within the state such offices as were maintained by the duly authorized agents of the plaintiff engaged in the purchase, inspection, grading, acceptance and delivery of raw and untreated cross-ties in hotels, automobiles, automobile trailers, all of which offices were never located at one point except temporarily, and as the needs of the plaintiff required; and the defendants further allege that the agents of the plaintiff within the State of Indiana during the taxing periods mentioned were, to a limited or qualified degree, fiscal agents of the plaintiff but that the exact scope of the agent's authority in fiscal matters and the exact degree of the limitations or restrictions placed upon such agents by the plaintiff is presently not known to the defendants, and the defendants further allege that the offices so maintained or had within the State of Indiana by the authorized agents of the plaintiff were limited and qualified fiscal offices of the plaintiff but that the exact degree of such limitations and qualifications of such offices and the agents thereof is not known to the defendants.

Subject to the qualifications heretofore set forth the defendants admit so much of paragraph "5" of the plain-

tiff's complaint as alleges that all payments to the plaintiff were made by bank drafts drawn on Pittsburgh banks, but the defendants allege that the plaintiff by specifically directing those who purchased cross-ties from it to do so required the purchasers to make payment to it at Pittsburgh, Pennsylvania, but that such receipts all arose out of business done by the plaintiff in Indiana.

21 Subject to the qualifications heretofore set forth the defendants admit so much of paragraph "5" of the plaintiff's complaint as alleges that the plaintiff deposited the funds received as payment from the respective railroad companies for raw and untreated cross-ties in banks located in Pittsburgh, Pennsylvania; but the defendants allege that during each of the annual taxing periods in question the plaintiff was engaged in doing business within the State of Indiana and that the plaintiff acting through the instrumentality of its duly authorized agents within the State of Indiana transacted all the business of the plaintiff relative to the acquisition, purchasing, inspecting, accepting, grading, approving, paying for, and delivery of the raw and untreated cross-ties to the purchasers of such cross-ties from the plaintiff; and the defendants further allege that during the major portion of the annual taxing period of 1935, and throughout the entire annual taxing period of 1936, and continuously to this date, the plaintiff had, as a foreign corporation, qualified to do business in the State of Indiana having so qualified and having been admitted to do business in the State of Indiana on March 18, 1935, as is fully disclosed by the records in the office of the Secretary of State of the State of Indiana; and the defendants further allege that all of the receipts used as a measure of the gross income taxes assessed against the plaintiff for each of the annual taxing periods specified in the complaint were derived from business or activities conducted within the State of Indiana and not otherwise, and that the taxes assessed were measured by the gross income of the plaintiff derived from the sale of raw or untreated cross-ties which cross-ties
22 were both acquired by the plaintiff and delivered to the purchaser within the State of Indiana.

6. The defendants deny so much of paragraph "6" of the bill of complaint as alleges that the plaintiff has been improperly charged with the tax referred to in the complaint and is entitled to recover such an amount. The defendants further deny the allegation that the receipts from the transactions described in the plaintiff's com-

plaint, upon which the gross income tax for the annual taxing periods in question was based, are receipts derived from a business conducted in commerce between the State of Indiana and other states of the United States, and which under the terms and provisions of Section 6 A of the Gross Income Tax Act of Indiana is exempt from taxation; and the defendants further deny the allegation that if the receipts derived from the sale of untreated cross-ties as described in the plaintiff's complaint are not exempt under the provisions of Section 6 A of the Indiana Gross Income Tax Act, then said Act in invalid and void and the assessment of taxes thereunder illegal as to the tax assessed on the receipts of the plaintiff derived from the sale of untreated cross-ties for the reason that the said tax so assessed constitutes a regulation of and a burden upon commerce between the State of Indiana and other states of the United States and is in conflict with Article I, Section 8, of the Constitution of the United States; and the defendants further deny that the plaintiff's receipts which formed the measure of the gross income tax assessed against the plaintiff and which the plaintiff now seeks to recover are proceeds from such transactions as are not properly taxable under the provisions of the Indiana Gross Income Tax Act and do not constitute receipts subject to the provisions and terms of the aforesaid Indiana
23 Gross Income Tax Act, and the defendants now affirmatively assert and allege that the receipts in question were derived from activities and businesses within the State of Indiana and hence that such income is derived from a source within the State of Indina and is properly taxable under and by virtue of the provisions and terms of the Indiana Gross Income Tax Act; and the defendants further deny that if the Indiana Gross Income Tax Act be construed to permit the State of Indiana to tax the plaintiff measured by the gross receipts derived from the sale of untreated cross-ties within the State of Indiana, that said act is illegal and void for the reason that it is in conflict with the Fourteenth Amendment to the Constitution of the United States in that it deprives the plaintiff of property without due process of law; and the defendants do now specifically deny each allegation made by the plaintiff in the paragraph designated as "6" in the plaintiff's bill of complaint.

7. The defendants as a further answer to the plaintiff's complaint say that as to any allegation or averment contained therein not either admitted or denied heretofore

in this Answer that the defendants now specifically deny each and all such allegations and averments.

8. Wherefore the defendants pray for judgment in their favor, for their costs, and for all other proper relief.

Omer Stokes Jackson,
Omer Stokes Jackson,
The Attorney General,
Joseph W. Hutchison,
Joseph W. Hutchison,
Deputy Attorney General,
Joseph P. McNamara,
Joseph P. McNamara,
Deputy Attorney General,
Attorneys for the Defendants.

219 State House,
Indianapolis, Indiana.

24 And afterwards to wit at the November Term of said Court, on the 7th day of January, 1939, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

It is ordered by the Court that the above entitled cause be and the same is hereby assigned for trial Wednesday, February 1, 1939, at 10:00 A. M.

25 And afterwards to wit at the November Term of said Court, on the 25th day of January, 1939, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

Upon request of plaintiff, it is ordered by the Court that this cause be, and the same is, hereby reassigned for trial on Wednesday, March 1, 1939, at 11:00 A. M.

26 And afterwards to wit at the November Term of said Court, on the 24th day of February, 1939, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

By agreement of parties, the assignment for trial on Wednesday, March 1, 1939, is hereby vacated and this case is hereby reassigned for trial on Friday, March 31, 1939, at 10:00 o'clock A. M.

27 And afterwards to wit at the November Term of said Court, on the 30th day of March, 1939, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

By agreement of parties, it is ordered by the Court that the above entitled cause be and the same is hereby reassigned for trial, Monday, April 24, 1939, at 10:00 A. M.

28 And afterwards to wit at the November Term of said Court, on the 24th day of April, 1939, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

Come now the parties by their respective attorneys, and the plaintiff files motion for leave to amend complaint, which motion is as follows:

29 IN THE DISTRICT COURT OF THE UNITED STATES. Filed Apr. 24, 1939.

(Caption—8)

MOTION FOR LEAVE TO AMEND COMPLAINT.

Comes now the plaintiff in the above entitled cause and moves the Court for leave to amend its complaint heretofore filed in the above cause in the following particulars:

(1) To strike out the first three sentences in the first literal paragraph on page 3, which is a part of paragraph numbered 5 of the complaint, beginning with the words "The receipts of" and ending with the words "in which it operates", in lines 1 to 20, and substitute therefor the following:

"The receipts of the plaintiff were from the B. & O. Railroad Company (hereinafter referred to as the "Railroad"), received as payment for untreated cross-ties delivered on cars of the Railroad. The ties so delivered were inspected along the right-of-way of the Railroad in the State of Indiana by agents of the plaintiff and Railroad, and were delivered by Indiana producers f. o. b. cars of the Railroad, pursuant to the terms and conditions of a certain contract between the Railroad and the plaintiff. Pursuant to an understanding with the Railroad, all of the raw cross-ties so delivered were immediately carried by the Railroad to a

creosoting plant at Finney, Ohio owned and operated by National Lumber & Creosoting Company, one of plaintiff's subsidiary corporations, and were there subjected to a treating process and re-delivered to the Railroad at Finney, Ohio, and ultimately used by the Railroad throughout the several States in which it operates."

(2) By striking out the word "treated", where the same appears in paragraph number 5 of the complaint on page 3, in the next to the last line, and substituting therefor the word "untreated".

(3) By striking out the last sentence in paragraph number 5, beginning at the bottom of page 3 of the complaint and ending in the second line on page 4 of the complaint, and substituting therefor the following:

"All payments to the plaintiff were made by bank checks drawn by the Railroad on banks outside of the State of Indiana for such invoices, and deposited by plaintiff in banks in Pittsburgh."

(4) By striking out the word "Pittsburgh", appearing in the last line in paragraph number 5, being the sixth line on page 4, and substituting therefor the words "Marietta, Ohio".

(signed) Frederick E. Matson,
(signed) Harry T. Ice,
Attorneys for the Plaintiff.

Matson Ross McCord & Clifford
951 Consolidated Building,
Indianapolis, Indiana,
Of Counsel.

On this 28th day of February, 1939, the defendants in the above entitled cause, and each of them, hereby consent to the amendment of the complaint in accordance with the foregoing motion.

(signed) Omer Stokes Jackson,
Attorney General.
(signed) Joseph W. Hutchinson,
Deputy Attorney General.
(signed) Joseph P. McNamara,
Deputy Attorney General.

219 State House,
Indianapolis, Indiana

31 (Entry continued for April 24, 1939.)

And the Court being duly advised sustains said motion, and the plaintiff's complaint is amended in accordance with said motion.

And the defendants now refile their answer as an answer to the complaint as amended.

And this cause is now submitted to the Court for trial, and the parties file stipulation of facts, which is as follows: (H. I.)

Additional evidence is heard, and the plaintiff is given to and including May 10, 1939, and the defendants are given to and including May 25, 1939, within which to submit tentative draft of special findings of fact and file brief, and the plaintiff is given to and including June 1, 1939, within which to file reply brief.

It is ordered by the Court that this cause be and the same is hereby assigned for oral argument, Monday, June 5, 1939, at 9:30 A. M.

32 And afterwards to wit at the May Term of said Court, on the 22nd day of May, 1939, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

Business of the Court requiring, it is ordered by the Court that the assignment of this cause for oral argument on June 5, 1939, be and the same is hereby vacated and set aside.

It is further ordered by the Court that this cause be and the same is hereby reassigned for oral argument on Friday, June 16, 1939, at 10:00 A. M.

33 And afterwards to wit at the May Term of said Court, on the 12th day of July, 1939, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

This cause coming on now to be finally heard by the court, and the parties appearing by their respective attorneys, and the court having heard the evidence and the argument of counsel and being sufficiently advised in the premises, now, pursuant to Rule 52 of the Rules of Civil Procedure,

signs and files herein its special findings of fact and states its conclusions of law thereon, which said special findings of fact and conclusions of law are ordered by the court filed and made a part of the record in this cause, all of which is now done.

34 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—8)

Filed July 12, 1939.

SPECIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Pursuant to Rule 52, the court now states its Special Findings of Fact, hereby adopting the "Stipulation of Facts" filed by the parties herein as its Special Findings of Fact, as follows:

Filed July 12, 1939.

35 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—8)

STIPULATION OF FACTS.

It Is Stipulated and Agreed between the parties hereto, that without prejudice to the right of either party to introduce additional evidence not inconsistent herewith or to object to any of the facts as irrelevant or immaterial, the following facts shall be considered in evidence herein as true:

1. Plaintiff, The Wood Preserving Corporation, is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at Pittsburgh in the State of Pennsylvania. Plaintiff is qualified to do business in the State of Indiana, but has no agents or employees within the State except as hereinafter specified, and maintains an agent in the City of Indianapolis, Indiana for the service of process. Plaintiff is engaged in the business of treating ties and timbers by creosoting and other preserving processes, and engages in the business of producing, purchasing and selling ties and timbers.

36 It does not, however, sell ties or timbers to any one other than to those with whom it has a contract to

treat such ties or timbers, nor does it produce or purchase ties or timbers for sale to any one other than to persons or corporations with whom it has a contract to treat the ties or timbers, and does treat the ties and timbers so produced and purchased.

2. Defendant, Department of Treasury of the State of Indiana, is an executive Department of the State of Indiana vested with the enforcement and application, through an administrative division known as the Gross Income Tax Division, of the Indiana Gross Income Tax Act of 1933 (Chapter 50, Indiana Acts of 1933), as amended by Acts of 1937 (Chapter 117, Indiana Acts of 1937). Defendants, M. Clifford Townsend, Peter F. Hein and Lawrence F. Sullivan, are each citizens and residents of the State of Indiana, County of Marion, and together constitute the Board of Department of Treasury of the State of Indiana.

3. The matter in controversy exceeds, exclusive of interests and costs, the sum of Three Thousand Dollars ($3,000.00).

4. On August 6, 1937, there was assessed against the plaintiff a gross income tax, together with interest, for the year 1934 in the amount of Two Thousand Four Hundred Forty-Four Dollars and Seventy-nine Cents ($2,444.79), and for the year 1935 in the amount of One Thousand Eight Hundred Seventy-six Dollars and Forty-one Cents ($1,876.41), and for the year 1936 in the amount of Two Thousand One Hundred Twenty-one Dollars and Twenty-seven Cents ($2,121.27), making a total assessment of Six Thousand Four Hundred Forty-two Dollars and Forty-
37 seven Cents ($6,442.47).

5. Thereafter, and on or about October 21, 1937, and within the time fixed by the provisions of the aforesaid Act and amendments, and upon forms prescribed by the Department of Treasury, plaintiff filed separate claims for the correction of the amount of tax paid and for a refund of the tax and interest so paid as aforesaid with the Department of Treasury, Gross Income Tax Division. Accompanying said statement for correction of the amount of tax and refund of the tax, and incorporated as a part thereof, was a petition for refund of the tax in which there was set forth at length the grounds of plaintiff's objections to the additional tax assessed.

6. After a hearing before the Gross Income Tax Division, and on the 18th day of August, 1938, the plaintiff, through the Department of Treasury, Gross Income Tax Division, was advised that plaintiff's claim for correction

of the amount of tax and refund of the tax, together with interest, paid for each of the years, was disallowed and the refund denied. Defendants have refused to pay to the plaintiff any portion or all of the tax and interest so paid for each of the aforesaid years.

7. Thereafter and within the time allowed by law, plaintiff brought this action to recover the tax and interest previously paid. Plaintiff has taken all the steps required by law to be taken before filing of this suit for refund.

8. The receipts in each of the years, upon which the tax sought to be recovered was assessed, arose out of the following course of business:

(a) On October 1, 1932, the Baltimore & Ohio Rail-
88 road Company, a corporation organized under the laws of the State of Maryland, with general offices at Baltimore, Maryland, and hereinafter called "the Railroad Company", was the owner of a tie and timber treating plant at Green Spring, West Virginia. At that time, and at all times herein involved, the Railroad Company had various lines extending through the State of Indiana. On that date, it leased the treating plant to, and entered into a contract for certain other services with, the Joyce-Watkins Company, which contract and lease is in the words and figures as follows, to-wit:

89 This Agreement made this 1st day of October, 1932, between The Baltimore & Ohio Railroad Company, hereinafter called "Railroad", and the Joyce-Watkins Company, hereinafter called "Contractor",

Witnesseth:

The treating capacity of the tie treating plant of the Railroad at Green Spring, West Virginia, which is approximately 6,000,000 cubic feet of timber per year, is in excess of that needed for requirements of the Railroad in territory which can economically be served from the Green Spring plant.

The Contractor agrees to operate the plant, treating such ties and timber as the Railroad may require and in addition the Contractor will endeavor to develop commercial business to the extent of the capacity of the plant not required by the Railroad.

The Contractor agrees to yard, store, season, handle and treat all the requirements of the Railroad, including bridge and switch ties and other timber, that are within an economical radius of distribution from Green Spring plant.

The Railroad agrees to deliver to the Contractor on cars at the Treating plant the ties and other forest products which it desires to have treated.

The Railroad agrees not to build other plants or contract with other plants for treating ties or timber for use in the territory that has normally been served by the Green Spring plant.

In the operation of the plant the Contractor will give preference to the requirements of the Railroad, and will be governed by the Railroad's specifications in all operations for their account. The treatment of commercial business will be scheduled so as not to interfere with the Railroad's requirements.

40 The Contractor will furnish all operating supplies and all labor necessary for operating the plant, storage yards, tracts and equipment.

The Railroad will, at its expense, keep in proper repair the standard gauge locomotives and cars used in intra-plant service. The Contractor will pay the Railroad each year for the cost of that proportion of such repairs as is represented by the percent of commercial treatment to the total treatment for the year. The Contractor will furnish all labor and material for the maintenance of plant and equipment and furnish all labor for the yard tract maintenance. The Railroad will furnish all materials for the maintenance of the yard tracks.

The Railroad will make replacements of complete units of the plant machinery and equipment as required by ordinary wear and tear when the condition of such machinery and equipment becomes such that it can no longer be maintained by repairs or replacements of parts.

The Contractor will make all additions to the plant and equipment required for their commercial business, and the Railroad will make all additions to the plant and equipment required to meet its needs.

The Railroad will purchase and deliver to the plant all the preservatives used for the treatment of ties and timber for its own use. The Contractor will unload and store these preservatives pending use.

The Contractor will purchase the preservatives for use in treatment of their commercial business.

The Railroad will purchase and deliver the coal and fuel oil needed for the operation of the plant. The Contractor will pay the Railroad each month for the cost of that portion of the coal and fuel oil used in the handling and treatment of the ties and timber they sell

41 commercially. The price will be f. o. b. Green Spring plant, the Contractor paying commercial rate of freight.

The Railroad will pay the taxes and insurance on the plant, and the Railroad's stock of ties and timber and preservatives and other materials.

The Contractor will pay the expense of compensation insurance on the labor employed by it.

The Contractor will operate the water pumping and water treating plant for engine supply, and will furnish compressed air and electric current for the interlocking plant and for lighting purposes in and around the station to the extent of the capacity of the present facilities, for which service payment is provided in the attached schedules. (Exhibit D).

The wood working mill, located on the treating plant grounds, will be operated by the Railroad, and any work done by the Railroad for the Contractor at this mill will be paid for as provided in the attached schedules. (Exhibit C).

An estimate of the quantity of material to be treated will be made by the Railroad and given to the Contractor, at the beginning of each year in order that the proper scale of prices as contained in the attached schedules may be applied to the work performed. In the final month of the year when the exact quantities become definitely known, any variation in prices due to the actual quantities will be adjusted on the final invoices for the last month of the year.

All the work done for the Railroad by the Contractor at the plant, and all work done by the Railroad for the Contractor at the wood working mill, and all coal and fuel oil furnished by the Railroad on account of the Contractor's commercial business will be invoiced each
42 month and these invoices will be paid fifteen (15) days after the receipt of the invoice.

For all work done for the Railroad by the Contractor under this contract the following schedule of prices will be paid:

Exhibit A—Treating Plant Prices.
" B—Storage Yard Prices.
" C—Wood Working Mill Charges.
" D—Cumberland Division Charges.
" E—Rates of Pay as of January 1, 1932.
Statement of method to be used in computing prices to conform to any changes in the rates of pay.

The prices given in these schedules are based on the rates of pay for labor as paid by the Railroad as of January 1, 1932, less than 10 per cent reduction that was made February 1, 1932. It is agreed that if any increases or further reductions are made in these rates of pay, corresponding increases or reductions will be made by the Contractor in the prices given in the attached schedules for work done by it for the Railroad. The rates of pay as of January 1, 1932, and a statement of the method to be used in computing prices to conform to changes in the rates of pay are given in Exhibit "E", attached hereto.

For the use of the plant and equipment in treating their commercial business the Contractor will pay the Railroad ..... per cubic foot of commercial timber treated.

At the expiration of the contract, the Contractor will return the plant and equipment back to the Railroad in the same condition as when received ordinary wear and tear and damage by the elements excepted.

The Contractor agrees to employ and use in the operation of the plant, insofar as its labor requirements
43 go, the employes heretofore employed at the plant by the Railroad at the wages paid by the Railroad unless otherwise agreed, subject, however, to any wage changes hereafter made in the Railroad wage scale, except in such individual instances where such employes may prove to be incompetent or otherwise unsatisfactory, and to cooperate fully with the Railroad in protecting the employes at the plant, many of whom are members of the Baltimore and Ohio Relief Department, with loans from said Department. Notwithstanding this provision, however, the employes collectively and individually on and after the effective date of this agreement will be and become employes of the Contractor, which will be responsible for all personal injuries received during and in the scope of such employment by the Contractor.

Ties in this agreement are understood to mean standard gauge railroad cross ties, unless otherwise indicated.

The Contractor agrees to sell to the Railroad all ties produced or purchased by it originating in territory from which ties in the usual course of business would be brought to the lines of the Railroad to the extent that the Railroad may give orders to the Contractor for the purchase of such ties.

"Right-of-way" territory is understood to mean that

territory from which timber is physically adjacent to the tracks of the Railroad where delivery of the ties is accomplished by teams, trucks or other means of transportation, except other railroads.

The Purchasing Agent of the Railroad shall advise the Contractor from time to time in writing of the quantities and kinds of ties which the Railroad will need and the time within which it desires the ties to be delivered, and the price which the Railroad is willing to pay the Contractor f. o. b. cars on the Railroad's tracks. The Contractor will produce or purchase from other producers
44 the ties so ordered, and sell and deliver the same to the Railroad as ordered to the extent that said ties may reasonably be produced or purchased from said territory.

If the Contractor is unwilling (and so notifies the Railroad in writing within thirty days after notification of quantity and price by the Purchasing Agent) to furnish ties to the extent that same reasonably may be produced in said territory in accordance with the price, terms and conditions of the written advice from the Purchasing Agent covering same, then this entire contract may be terminated on thirty days' written notice given by either party, and, upon the termination of such notice, the Contractor will surrender the treating plant subject to all the provisions of this contract in respect of termination upon the expiration of this agreement.

The Contractor agrees that it will not ship any ties originating in the said territory to others without permission of said Purchasing Agent.

The Railroad, being interested in certain operations in Hardy, Hampshire, Pendleton and Grant Counties, West Virginia, this contract shall not apply to those counties, and the Contractor agrees that it will not extend its operations into those counties without the consent of the Railroad.

This contract shall not limit the right of the Railroad to purchase ties produced in territory adjacent to its lines or elsewhere from others, nor require the Railroad to order ties from the Contractor except to the extent that it may see proper to do so.

The Contractor further agrees that its price to tie producers will not be more than _____ cents per tie under the price paid to it by the Railroad exclusive of load-
45 ing charge, and that the _____ cents margin or spread shall apply only in cases where cash is paid

to the producer by the Contractor when ties are delivered on the Railroad's right-of-way, and that if ties are not paid for in cash by said Contractor and are inspected by the Railroad and payment made by it in advance to the Contractor, then the latter's margin or spread on such ties shall not exceed _____ cents per tie.

All ties will be inspected by the Railroad's inspectors, as loaded into cars at the point of origin.

The Contractor shall invoice the ties promptly after inspection and acceptance by the Railroad inspectors. The Railroad will voucher and pay each week for all the ties covered by the necessary invoices and inspection reports.

The Railroad reserves the right to maintain and use the laboratory now located in the southwest corner of the main building for testing preservatives and experimentation.

If, in the event of the termination of this contract, the Contractor then has commercial orders and stock on hand at the Green Spring plant, the Railroad agrees it will permit the treatment of such orders on the same basis of cost as in this contract, provided such material must be treated within one year from the termination of the contract.

The Railroad will furnish such free transportation to employes of the Contractor engaged in service in connection with this contract to such extent as the proper officers of the Railroad may determine and as may be permitted by law.

This contract shall become effective on March 1, 1933, and shall continue for five (5) years from March 1,
46 1933, unless terminated as hereinbefore provided.

In Witness Whereof the Railroad has caused this agreement to be signed by its Vice-President, and the Contractor has caused this agreement to be signed by its Vice-president.

The Baltimore and Ohio Railroad Company,
By (Signed) C. W. Galloway,
Vice-President.

The Joyce-Watkins Company,
By (Signed) W. W. Watkins,
Vice-President.

For and in consideration of the sum of One Dollar ($1.00) and other goods and valuable consideration, Joyce-Watkins Company, an Illinois corporation, does

hereby assign to The Wood Preserving Corporation, a Delaware corporation, all of its right, title and interest in and to a certain agreement dated the 1st day of October, 1932, between The Baltimore and Ohio Railroad Company and Joyce-Watkins Company, said agreement being an agreement providing, among other things, for the operation by Joyce-Watkins Company of the tie-treating plant of said The Baltimore & Ohio Railroad Company located at Green Spring, West Virginia.

Dated this 3rd day of May, 1933.

Joyce-Watkins Company,
(Signed) By W. W. Watkins,
President.

Attest:
(Signed) F. W. Werner,
Secretary.

The Wood Preserving Corporation, a Delaware corporation, does hereby accept the assignment of the above mentioned contract dated October 1, 1932, between The Baltimore & Ohio Railroad Company and Joyce-Watkins Company, and hereby agrees to fully carry out the
47 terms of said contract.

Dated this 3rd day of May, 1933.

The Wood Preserving Corporation,
(Signed) By Grant B. Shipley,
President.

Attest:
(Signed) David M. Gilmore,
Secretary.

The Baltimore & Ohio Railroad Company does hereby consent and agree to the assignment and transfer from Joyce-Watkins Company, an Illinois corporation, to The Wood Preserving Corporation, a Delaware Corporation, of the above mentioned contract dated October 1, 1932, between The Baltimore & Ohio Railroad Company and Joyce-Watkins Company.

Dated this 3rd day of May, 1933.

The Baltimore & Ohio Railroad Company,
(Signed) By C. W. Galloway,
Vice-President.

Attest:
(Signed) G. F. May,
Secretary.

Attached to the aforesaid agreement are Exhibits A to E, inclusive, referred to in said agreement, which are eliminated for the reason that they relate to prices for treatment, storage, wood work, charges and rates of pay, all of which are conducted under the contract at Green Spring, West Virginia, and in no way relate to receipts of the plaintiff which were taxed by defendants in this case.

The price per cubic foot for treatment of commercial timber and the margin on ties is also omitted from the aforesaid agreement for the reason that it in no way relates to the receipts of the plaintiff which were taxed by the defendants in this case.

(b) On May 3, 1933, by an instrument between
48 plaintiff, The Wood Preserving Corporation, and Joyce-Watkins Company, the aforesaid contract was assigned to the plaintiff, and since said date and during all the times herein involved, plaintiff and the Railroad Company have carried out the provisions of the aforesaid contract so assigned, and all ties supplied to the Railroad Company have been supplied under that contract.

(c) On December 21, 1922, the Central Creosoting Company, a corporation organized under the laws of Delaware, owned and operated a tie and timber treating plant at Finney, Ohio, and on that date entered into a contract with the Baltimore & Ohio Railroad Company to treat ties of the Railroad Company, which contract is as follows, to wit:

49 This Agreement, made and entered into this 21st day of December 1922, by and between the Central Creosoting Company, a corporation organized and existing under the laws of the State of Delaware with General Offices located at Chicago, Illinois, hereinafter called the Contractor, party of the first part, and the Baltimore & Ohio Railroad Company, a corporation organized and existing under the laws of the State of Maryland, hereinafter called the Railroad, party of the second part, Witnesseth:

Whereas, the Railroad desires to contract for the preservative treatment of railroad cross ties for use on certain of its line of railroad, and

Whereas, the Contractor has the plant and equipment necessary to properly treat cross ties in the manner, to the extent, for the period, upon the compensation, and subject to the conditions as hereinafter set forth,

Now, Therefore, in consideration of the promises and the mutual covenants and agreements of the respective parties herein contained, and of the sum of One Dollar ($1.00) paid by the Contractor to the Railroad, the receipt whereof is hereby acknowledged, the parties hereto agree as follows:

Section 1. The Contractor represents and states it is duly and legally incorporated under the laws of the State of Delaware, that it has full corporate power to operate a timber-preserving plant within the State of Ohio, and that it has the right to use the treating processes herein prescribed, and to exercise and enjoy in connection therewith all patents, rights, or privileges necessary for the full performance of this agreement without hindrance from anyone, having or claiming to have patents or rights covering or relating to the treating processes prescribed herein.

Section 2. The Railroad agrees to deliver annually
50 to the plant of the Contractor at Finney, Ohio, for treatment during the life of this contract, not less than Six Hundred Thousand (600,000) cross ties; or more than One Million (1,000,000) cross ties; it being understood that should the Railroad elect to deliver for treatment more than Six Hundred Thousand (600,000) cross ties in any one calendar year, it will give the Contractor in writing on or before October 1st of the year preceding that in which the ties are to be treated, notice of such intention. It is mutually agreed, however, that should the Railroad at any time desire to increase the specified quantity of cross ties to be treated, it may avail itself of any part of the capacity of the treating plant which has not then been otherwise contracted. It is further agreed that during the life of this contract the Railroad will not contract with any other than the Contractor for the treatment during any year thereof of cross ties for use on its lines before offering to the Contractor for privilege of treating cross ties in excess of the minimum of Six Hundred Thousand (600,000) cross ties to the extent of the available capacity of the treating plant for that year, but not in excess of the maximum of One Million (1,000,000) cross ties herein provided. Nothing, however, in this provision is to interfere with the Railroad treating at its own plant as Green Springs, West Virginia, ties for use on any of its line.

In the event the Contractor is unable to provide piling space for ties in sufficient quantity to permit thorough

seasoning to take care of the maximum quantity desired by the Railroad, the Railroad reserves the right to contract for the treatment of such ties at other plants, as a matter of protection in providing the necessary number of ties to be used for the year.

Section 3. The Railroad agrees to deliver the cross
51 ties to be treated to the Contractor f. o. b. cars at its plant in such quantities and at such intervals as will provide cross ties sufficiently seasoned to operate the plant of the Contractor on or after January 1st, 1923, at the minimum capacity contracted for in Section 2, provided the Contractor is in position to receive the desired number of ties as offered by the Railroad.

Section 4. The Contractor agrees to receive said cross ties at its plant, to unload such as may require additional seasoning and pile them in its yard in the manner prescribed by the representative of the Railroad, allowing them to remain so piled until properly air-seasoned for treatment. The Railroad agrees to pay the Contractor for unloading and piling unseasoned cross ties the rates provided for in Section 17.

Section 5. The Railroad agrees that in loading cross ties for shipment to plant of the Contractor, it will, in so far as practicable, separate the cross ties in the cars or load them into separate cars in the following manner:

A. White Oak Ties.

B. As hardwood cross ties, Red Oaks, beech, hard maple, locusts, elm, hickory and ash.

C. As softwood cross ties—Soft maple, birch, hackberry and gum.

D. As pines—Yellow pine and cypress.

The Contractor agrees that in unloading and storing in its yard the cross ties delivered to it by the Railroad, the said assortment shall be maintained and that each stack shall have painted upon it the initial, number, grade and outturn of each car from which the cross ties are unloaded and the date of unloading.

Section 6. In the event that the Railroad does
52 not succeed in affecting the separation of cross ties as provided for in Section 5, at the time of loading said cross ties into cars, the Contractor agrees that upon receipt of carloads of cross ties which have not been so separated, it will separate the cross ties into classes at the time of unloading or at the time of treating.

The Railroad agrees in such event to provide an authorized representative to classify such ties as they are

unloaded and treated, or, failing in this, the Contractor shall have the right to determine such classification, acting in such case as the authorized representative of the Railroad.

The Railroad agrees to pay the Contractor for labor in making the separation provided for in this paragraph the rates as provided in Section 17.

Section 7. The Contractor agrees to receive and unload without delay at its plant all ties or other material of the Railroad to the limit of yard and labor capacity, it being understood that the ties or other material shipped by the Railroad will at all times receive preference in handling.

Section 8. When cross-ties shipped by the Railroad have become sufficiently air-seasoned to permit of satisfactory treatment, they are to be treated by the Contractor by any standard process of treatment approved by the American Wood-Preservers' Association, which the Railroad may designate.

Section 9. The Contractor agrees that the piling of cross-ties in its storage yard shall be subject to direction of a representative of the Railroad, that the representative of the Railroad may inspect at the plant of the Contractor all cross-ties, both before and after treat-
53 ment; that the representative of the Railroad shall have full access at all times to all details in connection with the treatment of ties for the Railroad, shall determine when ties are properly seasoned, that the process of treating and ingredients used in connection therewith shall be subject to his inspection and supervision, shall be permitted to examine and test all solutions and ingredients received at the plant of the Contractor to be used in treatment of cross ties for the Railroad and shall be permitted to take such samples of any and all such solutions and ingredients as may be required by the Railroad for test.

Section 10. The Contractor agrees that the Engineer's or Superintendent's records of the details of the operation of the plant, while engaged in the treatment of cross-ties for the Railroad, shall be kept in the form prescribed by the representative of the Railroad upon form supplied by the Railroad and that copies of the records shall be supplied to such officials of the Railroad as may from time to time be designated by the Railroad.

Section 11 The Contractor agrees that on the completion of the treatment of the cross-ties in accordance with the specifications provided for in Section 8, and after their

acceptance by the representative of the Railroad, it will, with its own forces, load the cross ties in cars at its plant, maintaining the following separations:

Grades 1 and 2 of either Class A, Class B, Class C or Class D;

Grades 3 of either Class A, Class B, Class C or Class D;

Grades 4 and 5 of either Class A, Class B, Class C or Class D.

and consign them to the Railroad at such points and in care of such representatives of the Railroad as may be designated by the Railroad, mailing notice of the shipment of each carload, on forms prescribed by the
54 Railroad, to designated representatives.

The Railroad agrees to supply all strips, stakes, wire and other material necessary in loading the cross ties for shipment, and if supplied by the Contractor on request of the Railroad that the Railroad will pay the Contractor actual cost thereof delivered in place at the plant.

The Railroad agrees to supply sufficient cars to remove with reasonable promptness all treated cross ties as and when they are ready to be shipped, or in event it fails to do so or should elect to have cross-ties stored on the premises of the Contractor after treatment, then the Contractor agrees to stack the cross-ties on its premises to the satisfaction of the Railroad's representative and to consider the performance of this operation to be the same as if the cross ties had been loaded for shipment; provided, however, that the Contractor will not be called upon by the Railroad to hold in storage upon the Contractor's premises more than twenty per cent (20%) of the cross-ties treated in one year.

Section 12. The cost of loading into cars by the Contractor of any cross-ties, which, at the request of the Railroad, have been piled on the Contractor's premises for storage after treatment as provided for in Section 11, shall be paid to the Contractor by the Railroad at rate provided in Section 17.

Section 13. The Contractor agrees to apply "S" Irons to such cross ties of the Railroad as may be designated by the representative of the latter, and in the manner as prescribed by him.

The Contractor further agrees to obtain the necessary "S" Irons from the Railroad, and to apply them to the

designated cross ties for the rates provided in Section 17.

55 Section 14. The Contractor agrees that in the operation of its plant preference will be given to the treatment of cross ties which it is bound to treat each month for the Railroad under the terms of this agreement, and that it will not treat or agree to treat other material that might interfere with the delivery of the monthly allotment to the Railroad, without its written consent first obtained.

Section 15. The Contractor agrees to provide against the loss by fire of the cross ties of the Railroad, while the cross ties are on the Contractor's premises, by maintaining at its plant a large capacity fire pump and an overhead water storage tank connected with a system of water mains and fire hydrants located throughout the premises.

The Contractor further agrees to carry insurance to the amount of One Hundred and Twenty-five Thousand Dollars, ($125,000.00) to guard against damage or destruction by fire of ties or other material belonging to the Railroad while in possession of the Contractor. Policies for this insurance to be drawn jointly in favor of the Contractor and the Railroad. The Contractor agrees to furnish the Railroad with certificate of insurance for each policy issued.

Section 16. The Railroad agrees to pay the Contractor and the Contractor agrees to accept from the Railroad as compensation and settlement in full for the treatment of cross ties of the Railroad and for all services performed in connection with said treatment, except for unloading untreated ties for seasoning, handling, storing, ironing, applying loading material and loading treated ties from the yard to cars after treatment, covered by Sections 4, 6, 11, 12, and 13 of this agreement, in the manner, to the extent and according to the specifications hereinbefore prescribed, the following sum of _____ per cubic foot of timber, for the treatment of cross ties

56 accepted by or treated as directed by the Railroad's representative, plus the cost of the preservatives used in the treatment (if supplied by the Contractor) as determined by reading or working tank guages and checked by an inventory of preservatives taken at the end of each calendar month by a representative each of the Railroad and the Contractor, also plus any royalty charge that it is necessary for the Contractor to pay for the

privilege of using any patented treating process that the Railroad may designate.

Prices for the treatment and handling of cross ties are subject to change and adjustment, in the event conditions so warrant, by mutual agreement of the Railroad and the Contractor.

Section 17. The Railroad agrees to pay the Contractor and the Contractor agrees to accept from the Railroad as compensation and settlement in full for such handlings as may be necessary to fulfill this contract in addition to loading cross ties on trams for treatment and unloading cross ties from trams to cars or to stacks in yard after treatment, the following price:

For unloading and stacking cross ties in yard for seasoning, as required in Section 4, _____ per tie;

For each handling (other than loading on trams for treatment or unloading from tram to car or stacks in yard after treatment) necessary to separate cross ties as required by Section 6, _____ per tie;

For loading treated cross ties from ground into cars as required in Section 12, _____ per tie;

For applying "S" irons as required in Section 13, _____ per iron.

Section 18. The Railroad agrees to supply to the Contractor all preservatives necessary for the proper treatment of cross ties of the Railroad as herein specified and should the Railroad elect to have the Contractor furnish the preservatives, the Contractor agrees to make no purchase of such preservatives without first obtaining the written approval of the Railroad as to the price to be paid therefor.

57 The Contractor agrees to keep any preservatives supplied by the Railroad separate from other preservatives at its plant insofar as it is practicable with the present plant storage capacity, and to use it only in the treatment of material for the Railroad, and in the manner and quantity prescribed by the Railroad's representative at the plant of the Contractor.

Section 19. It is mutually agreed that in calculating the payments for treatment provided for in Section 16, the volume of each full cylinder load shall be Sixteen Hundred and Fifty (1650) cubic feet, regardless of the size of such ties; and any charge of less than full length shall be in proportion. The Contractor agrees to load each tram to its full capacity.

Section 20. The Contractor shall invoice the Railroad

on or before the tenth day of each month at the agreed price per cubic foot for the treatment of all cross ties and for all services rendered to the Railroad under this contract during the next preceding month, giving such information as may be required by the Railroad.

The Railroad agrees to pay the Contractor for the treatment of said cross ties on or before the thirtieth day of the month next succeeding that in which the said cross ties are treated.

Section 21. The Railroad agrees to do such switching of standard guage cars to and from the Contractor's plant as may be necessary to enable the Contractor to fulfill the requirements of the contract without charge therefor to the Contractor. The Contractor agrees to make request for only such switching as is reasonable, necessary and as nearly as practicable at times most convenient to the Railroad between the hours of 7:00 A. M. and 6:00 P. M.

Section 22. The Contractor agrees that its treating
58 plant shall be fully equipped for the handling and treating of switch ties, piling, timber, plank and paving blocks by the processes hereinbefore described and that it will accept from the Railroad and treat for it such material in such quantities and at such prices as may be from time to time agreed upon.

Section 23. This agreement is made to become effective upon the date of signature by both parties hereto and to remain in force for a period of five (5) years from that date, and to continue in effect thereafter subject to cancellation by either party upon six (6) months' notice given in writing to the other party to this agreement.

The period which shall be used to determine the number of cross ties treated shall be from January 1st to December 31st.

In Witness Whereof, the parties hereto have caused this agreement to be duly executed in duplicate the day and year first above written.

Central Creosoting Co.
By E. J. Stocking,
Its Vice President.

Witness:
H. B. Pigman.

The Baltimore and Ohio Railroad Co.
By W. S. Galloway,
Its Purchasing Agent.

S. M. Elder.

59 **SUPPLEMENT TO AGREEMENT OF DECEMBER 21, 1922, BETWEEN THE CENTRAL CREOSOTING COMPANY AND THE BALTIMORE AND OHIO RAILROAD COMPANY.**

The Central Creosoting Company desires to provide additional storage ground on which to pile for seasoning 300,000 additional cross ties, and to add further to the equipment to enlarge its operations.

In order to justify the additional expenditure, it is agreed to extend the time of the contract as herein after provided, upon condition that the Creosoting Company will provide the additional storage ground and increase its facilities so as to enlarge the output of the plant.

It Is, Therefore, Agreed this thirteenth day of February, 1924, that the agreement between the Central Creosoting Company and the Baltimore & Ohio Railroad Company of December 21, 1922, is amended as follows:

1. Section 23 of the original contract is amended so that the contract will extend to December 31, 1933, and thereafter until terminated by either party by giving six months' notice in writing, which notice may be given so as to terminate the contract on December 31, 1933, or on any day thereafter. This extension shall not be effective unless the Creosoting Company within one year from January 1, 1924, has increased its storage capacity by filling in the gravel pit at the plant at Finney, Ohio, sufficiently to provide additional storage ground on which to pile for seasoning 300,000 additional cross ties, and has added to its equipment so that it can operate its plant so as to treat the number of ties called for in Section 2 of the original contract. A lease of additional ground will be made to the Creosoting Company for the enlargement of the plant.

2. The last paragraph of Section 16 is amended to
60 read as follows:

Prices for the treatment and handling of cross ties are subject to change and adjustment to meet the increase or decrease of cost of labor and materials by mutual agreement between the Railroad Company and the contractor, and, if they cannot agree as to such changes, then the prices shall be submitted to arbitration, based upon the prices paid by the Railroad or by others for the same service and offers made by other treating plants for the same service.

3. All the terms of the original contract shall remain in effect as hereby modified.

Central Creosoting Company,
By J. T. Logan,
President.

The Baltimore & Ohio Railroad Company,
By W. S. Galloway,
Purchasing Agent.

61 Some time prior to the year 1933, the National Lumber & Creosoting Company, a Delaware corporation, became the corporate successor of Central Creosoting Company, and took over and assumed the aforesaid contract with the Baltimore & Ohio Railroad Company. After the National Lumber & Creosoting Company had succeeded to the rights of the Central Creosoting Company, and prior to the year 1933, the plaintiff, The Wood Preserving Corporation, acquired a majority of the capital stock of National Lumber & Creosoting Company, which was, throughout the years in question, controlled by plaintiff, The Wood Preserving Corporation. During the years in question, the provisions of the aforesaid contract with the Baltimore & Ohio Railroad Company were carried out and performed by plaintiff's subsidiary company, National Lumber & Creosoting Company.

(d) During the years in question, the following was the regular course of business: The Railroad Company, by telephone calls from its purchasing agent at Baltimore, Maryland, advised a representative of the plaintiff, at its office at Marietta, Ohio, of the ties to be required by it for a certain period in advance, and the price which it would be willing to pay. The oral communication of the order of the Railroad Company for ties under the Joyce-Watkins contract was acknowledged by agents of the plaintiff at Marietta, Ohio, and thereupon the plaintiff prepared and mailed to known producers of cross-ties in the State of Indiana and elsewhere, a price list stating the size, quality and kind of ties which it would accept at loading points along the right-of-way of the Baltimore & Ohio Railroad, and the prices which it would pay for such ties, as evidenced by a notice similar to the following:

62 Issue 11
July 9, 1937.

Cross Ties
The Wood Preserving Corporation
Marietta, Ohio

We are in the market at the present time for Cross Ties manufactured and cross piled as required by our specifications and subject to our inspection at acceptable loading points on The Baltimore and Ohio R. R. at prices for the sizes and kinds shown below:

All Ties 8½ Feet Long

Size	Group Ua Black Locust White Oaks Black Walnut	Group Tb Honey Locust Red Oaks	Group Tc Beech, Birches Cherry Hard Maples Hackberry
No. 1	.41	.41	.31
No. 2	.56	.56	.46
No. 3	.76	.76	.66
No. 4	.91	.91	.81
No. 5	1.01	1.01	.91

The above prices are on the ground and we pay additional for loading to cars.

Our inspectors make immediate payment by sight draft at time of inspection.

Ties delivered at points on the B. & O. right-of-way other than at acceptable switches or side tracks will not be accepted.

Ties of each group must be piled in separate piles.

The above prices are subject to change or withdrawal without notice.

When ties are piled at loading points on the B. & O. Railroad according to the above and our specifications, each pile should be marked with a tag on which is written "For The Wood Preserving Corporation" and the owner's name and address.

Correspondence regarding inspection may be addressed to our representative in your territory or to The Wood Preserving Corporation, Marietta, Ohio.

For copies of specifications or other information, address The Wood Preserving Corporation, Marietta, Ohio.

If you decide to produce ties for us, please advise, indicating your loading points.

This schedule does not apply to Hampshire, Grant, Hardy or Pendleton Counties, West Virginia, nor to the territory between Lexington, Virginia, and Harrisonburg, Virginia.

This price list cancels and takes the place of all previous issues.

Dimensions. All ties shall be eight (8) feet six (6) inches long.

All the shell measure is taken throughout both widths of the tie, from the middle of the tie.

Size	Sawed or Hewed Top, Bottom, and Sides	Sawed or Hewed Top and Bottom
1	8"	8"
2	8" × 6"	7" × 6"
3	8" × 6"	8" × 6" OR 7" × 6"
4	8" × 7"	8" × 7"
5	9" × 7"	9" × 7"

The lengths, thickness and widths specified are minima for the standard sizes. Ties over 8" longer, thicker or wider than the standard size ordered will be rejected.

All measurements of thickness and width will be made at both ends bearing surfaces between 20" and 24" from the middle of the tie, and the specified dimensions must be met throughout both these sections of the tie.

Right.—(2) feet six (6) inches.

The top of the tie is the plane farthest from the pith of the heart. Timber cut out the pith is present in the tie.

Before manufacturing ties, purchaser shall determine which species, or class will be accepted, and whether they are to be hewed or sawed and in other case whether on the sides as well as on the top and the bottom.

General Quality. All ties shall be free from any defects that may impair their strength or durability as wood ties, such as decay, large knots, large shakes, holes or unsound knots or knots, grain with slope greater than one in sixteen.

Manufacture. All ties shall be straight, well hewed or sawed, and exposed at the ends have bottom and top parallel, and have back uniformly removed.

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64 Holes. A large hole is one more than ½ inch in diameter and 3 inches deep within, or more than one-fourth the width of the surface on which it appears and 3 inches deep outside, the sections of the tie between 20 inches and 40 inches from its middle. Numerous holes are any number equaling a large hole in damaging effect. Such holes may be caused in manufacture or otherwise.

Knots. A large knot is one whose average diameter exceeds one-fourth the width of the surface on which it appears; but such a knot may be allowed if it occurs outside the sections of the tie between 20 inches and 40 inches from its middle. Numerous knots are any number equaling a large knot in damaging effect.

Shake. One which is not more than one-third the width of the tie will be allowed.

Split. One which is not over 5 inches long will be allowed, provided a satisfactory anti-splitting device has been properly applied.

Manufacture. A tie will be considered straight: (1) When a straight line along the top from the middle of one end to the middle of the other end is entirely within the tie; and (2) when a straight line along a side from the middle of one end to the middle of the other end is everywhere more than 2 inches from the top and the bottom of the tie.

A tie is not well hewed or sawed when its surfaces are cut into with score-marks more than ½ inch deep or when its surfaces are not even.

The top and bottom of a tie will be considered parallel if any difference in the thickness at the sides or ends does not exceed ½ inch.

Ties will be sized up by their smaller ends and sized down by their larger ends. The dimensions of the tie will not be averaged.

Each stack shall have fastened to it a tag on which is written, "for The Wood Preserving Corp." the owner's name and address, the date when stacked, and the number of ties of each kind of wood in the stack.

All ties are at the owner's risk until accepted. All rejected ties shall be removed within one month after inspection.

Ties delivered for inspection shall be stacked not less than 10 feet from the nearest rail of any track at suitable and convenient places; but not at public crossings, nor where they will interfere with the view of trainmen or of people approaching the railway. Ties shall be stacked in alternate layers of 2 and 7, the bottom layer to consist of

2 ties kept at least 6 inches above the ground. The next layer shall consist of 7 ties laid crosswise of the first layer. When the ties are rectangular, the two outside ties of the layers of seven and the layers of two shall be laid on their sides. The ties in layers of two shall be laid at the extreme ends of the ties in the layers of seven. No stacks may be more than 12 layers high, and there shall be 5 feet between stacks to facilitate inspection. Ties which have stood on their ends on the ground will be rejected.

Any acceptance of ties in variation with any of the above provisions shall not be construed or implied as a waiver by The Wood Preserving Corporation, to thereafter enforce the above requirements.

The Wood Preserving Corporation
102 Front Street—Marietta, Ohio
Our Representative in Your Territory is:

65 Producers having available supplies of ties, and being willing to furnish the ties at the prices stated in the price list, would notify by mail, wire or phone, the Marietta, Ohio office of the plaintiff of the quantity and type of ties and the loading point for such ties as the producer was willing to furnish under the price list, or plaintiff's agent would make such arrangement with producers in Indiana. All prices in the price list were for ties on the ground, but plaintiff customarily paid the producer an additional sum for loading the ties on to cars of the Railroad, and as a regular practice during the years here involved, the ties were loaded on to cars of the Railroad at the loading points by agents or employees of the producers furnishing ties. When the ties were ready at a loading point, an inspector of the plaintiff and of the Baltimore & Ohio Railroad Company would go to the loading point, and all ties accepted by the Railroad Company's inspector were loaded by the producer on cars of the Railroad. Ties rejected by the Railroad inspector were not loaded on cars or paid for by plaintiff. A shipping report is also made out by plaintiff's agent and one copy sent to plaintiff's Marietta office and one to the Finney treatment plant. All shipping reports were, as follows, excepting only for dates and descriptions of ties:

(H. I.)

66 The Wood Preserving Corporation

Office _____ Date 12-3, 1935.

Loaded at Vallonia, Ind. on St. Louis Div. B. & O. R. R.
Billed to B. & O. R. R. Care of E. Stimson.
At Finney, Ohio. Shipper Wood Pres. Corp.

Car Initial	Car No.	Kind	1	2	3	4	5	Total
B. & O.	171399	UA	27	19	10	6	8	70
		TA	6	7	16	17	36	82
		TC	2	3	20	53	132	210
		TL		2	6	2	16	26
								388

H. C. Osr, Foreman W. S. Shrive, Inspector.

67 Also at the end of each day, the Railroad inspector prepared an inspection report of the ties accepted, and furnished a copy of the report, in duplicate, to plaintiff's inspector. Upon the basis of this inspection report, plaintiff's inspector, by drafts on banks outside of the State of Indiana, settled with the producer for the ties accepted by the Railroad Company, as aforesaid. The amount of the drafts was predicated upon the price lists, plus the loading charges above referred to, if any. One copy of the Railroad's inspection report was sent forward to the Marietta, Ohio, office of the plaintiff, together with plaintiff's inspector's shipping reports and copy of the draft drawn to the producer. One copy of the shipping report, together with the billing of cars, was sent forward to the Finney, Ohio treatment plant and to the Baltimore, Maryland office of the Railroad Company. In the Marietta, Ohio office of the plaintiff, at the end of each week, the plaintiff prepared an invoice against the Railroad Company for ties inspected and reported during the previous week, as shown by the inspection reports, and forwarded the same to the Baltimore, Maryland office of the Railroad Company. The invoices so prepared and forwarded to the Baltimore office of the Railroad were as follows, except for description of cars and dates:

(H. I.)

68 WPC-82-S 50M 4-37 Invoice Copy Sales Dept.

The Wood Preserving Corporation
Ayer & Lord Division
Century Division
Carolina Wood Preserving Company
National Lumber & Creosoting Company

Customer's
Order No. & Date 7240-2/26/35 Invoice No. 422-8030
Requisition No. Invoice Date 8/24/37
Contract No. Our Order No. 422-622-99221
Shipped to B & O Railroad Co.,
c/o P. Petri, Chief Eng. M of W
Destination Finney, Ohio
The Baltimore & Ohio Railroad Co.,
Baltimore, Md.
M. S. R. Number
Terms:
Date Shipped From Indiana F. O. B. Point of
Car Initial & No. Freight Origin
How Shipped & Route B & O

Minimum Prices		Price Per Unit
Cross Ties as listed and supported by Inspection Reports as indicated.		
Car B & O 174596 Geo. D. Young Report #196) Car B & S 6467	400 Ta Ties	$ 357.90
Geo. D. Young Report #196) Car B & O 183493	263 Ta Ties	249.05
Geo. D. Young Report #196) Car B & O 180233	199 Tc Ties	180.75
Geo. D. Young Report #197) Car B & O 171477	400 Ta Ties	428.00
Geo. D. Young Report #197) Car C & A 17779	400 Ta Ties	431.00
Geo. D. Young Report #198) Car B & O 181046	416 Tc Ties	382.80
Geo. D. Young Report #199) Car B & O 178547	300 Tc Ties	298.30
Geo. D. Young Report #200) Car C & A 17776	408 Ua Ties	418.00
Geo. D. Young Report #201)	410 Ta Ties	405.50
	Amount	$3,151.30

69 At the end of each month, the Marietta office of the plaintiff mailed to the Pittsburgh, Pennsylvania office of the plaintiff distribution sheet showing all ties invoiced to the Railroad.

Payments to the plaintiff for the ties so furnished were made in the regular course of business by the Baltimore & Ohio Railroad by checks drawn on banks located in cities outside of the State of Indiana, mailed to the plaintiff at its Pittsburgh, Pennsylvania office, and deposited there. The receipts of the plaintiff from the ties so paid for in the manner aforesaid during the periods in question were as follows, and the tax and interest paid thereon and herein sought to be recovered were as follows:

For the period from January 1, 1934 To December 31, 1934	
Gross Receipts from ties produced in Indiana	$219,284.64
Less exemption	1,000.00
Amount subject to tax	$218,284.64
Amount of tax computed at the rate of 1%	2,182.85
Interest to date of payment assessed	261.94
Total tax and interest paid and herein sought to be recovered	$ 2,444.79
For the period from January 1, 1935 To December 31, 1935	
Gross Receipts from ties produced in Indiana	$168,536.65
Less Exemption	1,000.00
Amount subject to tax	167,536.65
Amount of tax computed at the rate of 1%	1,675.37
Interest to date of payment assessed	201.04
Total tax and interest paid and herein sought to be recovered	$ 1,876.41
For the period from January 1, 1936 to December 31, 1936	
Gross Receipts from ties produced in Indiana	$201,119.60
Less exemption	1,000.00
Amount subject to tax	$200,119.60
70 Amount of tax computed at the rate of 1%	$ 2,001.20
Interest to date of payment assessed	120.07
Total tax and interest paid and herein sought to be recovered	$ 2,121.27

9. All of the ties originating in Indiana during the years of 1934, 1935, and 1936 were delivered to the Railroad Company f. o. b. cars at points of origin within Indiana, were carried by the Railroad Company from the point of origin in Indiana to the Finney, Ohio treating plant, and there yarded, seasoned and treated pursuant to the Central Creosoting contract, and a separate charge, pursuant to the terms of that contract, was made by the plaintiff's subsidiary company, National Lumber & Creosoting Company at the time of the completion of the treatment. During the years of 1934, 1935 and 1936, none of the ties were ever carried by the Railroad Company to points in Indiana, but all ties were at all times carried to Finney, Ohio for treatment. Plaintiff did not during the years of 1934, 1935 and 1936 receive any funds in the State of Indiana. All agents of the plaintiff who, during the years 1934, 1935 and 1936 had contact with the ties originating in Indiana, were responsible to and traveled from the Pittsburgh, Pennsylvania and Marietta, Ohio offices of the Company, and none of such agents had a regularly established place of business in the State of Indiana.

10. All of the Regulations officially promulgated by the Department of Treasury pursuant to the provisions of Section 25 (a) of Chapter 50 of the Indiana Acts of 1933, and in force during the years 1934, 1935 and 1936, so far as pertinent or material to the issues in this case, may be judicially noticed by the Court.

71 11. Plaintiff maintained no office in the State of Indiana. In addition to the agent maintained by plaintiff in the City of Indianapolis, Indiana, for the service of process, plaintiff during the years 1934, 1935 and 1936 normally had one agent or employee assigned to the Indiana territory who was engaged in the buying of ties and was responsible to the Marietta, Ohio, office. Plaintiff's District Manager of Production and Operation, with headquarters at plaintiff's Marietta, Ohio, office, made periodical trips to Indiana during said years to interview people with whom plaintiff did business in relation to complaints, giving them assistance, and other matters that were beyond the authority of the normal field man's scope.

At the end of each day's loading of ties along the right of way of the Railroad in Indiana, the ties were billed by plaintiff's agent in the name of Wood Preserving Corporation, as shipper, to the Baltimore & Ohio Railroad, in

care of the person who was at the time Chief Engineer of Maintenance, at Finney, Ohio. A copy of the written instrument typically used in such billing during the years 1934, 1935 and 1936 is attached to this finding, marked "Exhibit No. 1" and made a part hereof. The plaintiff paid no freight to the Railroad Company for transportation to Finney, Ohio, of the ties so loaded in Indiana and billed to the Railroad Company as above stated.

Shortly after the assignment to plaintiff on May 3, 1933, by Joyce-Watkins Company of its contract with Baltimore & Ohio Railroad Company, and prior to the beginning of plaintiff's operations under said contract, W. S. Galloway, Purchasing Agent of the Baltimore & Ohio Railroad Company, whose office was at Baltimore, Maryland, in oral conversation with Sherman S. Watkins, who was plaintiff's District Manager of Production and
72 Operation during the years 1934, 1935 and 1936, with headquarters at plaintiff's office at Marietta, Ohio, gave instructions to said District Manager for plaintiff as follows:

"You will, of course, ship all ties originating at points on the B. & O. Railroad west of the Ohio River to Finney, Ohio; and ties originating east of the Ohio River to Green Spring, West Virginia."

These instructions relative to shipment of ties were accepted and carried out by plaintiff during the years 1934, 1935 and 1936.

All of the ties furnished by plaintiff to the Baltimore & Ohio Railroad Company under the Joyce-Watkins contract during the years 1934, 1935 and 1936 were treated before use by the Railroad Company.

The gross receipts referred to at the end of Finding No. 8 (d) were receipts by plaintiff from cross ties sold and delivered to the Railroad Company pursuant to the contracts above referred to and the course of dealings as set out in these findings of fact.

Robert C. Baltzell,
Judge.

July 12, 1939.

73 **EXHIBIT NO. 1.**

(Uniform Domestic Straight Bill of Lading, adopted by Carriers in Official, Southern and Western Classification territories, March 15, 1922, as amended August 1, 1930.)

1st Sheet

Uniform Straight Bill of Lading
(Prescribed by the Interstate Commerce Commission)
Original—Not Negotiable

(Cut)

Shippers, No._____

Agent's No._____

The Baltimore and Ohio Railroad Company

Received, subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading,
at Vallonia, Ind. Dec. 3, 1935
from Wood Preserving Corp.
the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown, marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

(Mail or street address of consignee—)
(For purposes of notification only)

Consigned to B & O R. R. Co. % E. Stimson
Destination Finney State of Ohio County of_____
Route_____
Delivering Carrier_____ Car Initial B & O Car No. 171399

No. Packages	Description of Articles, Special Marks and Exceptions	*Weight (Subject to Correction)	Class or Rate	Check Column
1	Car Cross Ties Copy			

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

Note—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding _____ per _____

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

_____
(Signature of Consignor)

If charges are to be prepaid write or stamp here, "To Be Prepaid."

_____

Received $_____ to apply in prepayment of the charges on the property described hereon.

_____
Agent or Cashier

Per _____

(The signature here acknowledges only the amount prepaid.)

Charges Advanced:

$_____

Wood Preserving Corp.,
Shipper.

Per HCOST
O. D. Schadley,
Agent.

Per _____

Permanent post-office address of Shipper _____

Contract Terms and Conditions.

Sec. 1 (a) The carrier or party in possession of any of the property herein described shall be liable as at common laws for any loss thereof or damage thereto, except as hereinafter provided.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party, entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes.

(c) In case of quarantine the property may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's dispatch at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when property is so discharged, or property may be returned by carrier at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to property, shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detention, loss or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable, except in case

of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its agents, or officers as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

Sec. 2. (a) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

(c) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: Provided, That the carrier reimburse the claimant for the premium paid thereon.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to

necessary cooperage and baling at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership (and prompt notice thereof shall be given to the consignor), and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs, lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman, only, or at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

(b) Where nonperishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it, or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier: Provided, That the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks,

in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published: Provided, That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale: Provided, That if time serves for notification to the consignor or owner of the refusal of the property or the failure to receive it and request for disposition of the property, such notification shall be given, in such manner as the exercise of due diligence requires before the property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expense of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owner of the property sold hereunder.

(f) Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and, except in case of carrier's negligence, when received from or delivered to such stations, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from locomotive or train or until loaded into and after unloaded from vessels.

Sec. 5. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 6. Every party, whether principal or agent, ship-

ping explosives or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. Provided, that, where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not

those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. (a) If all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to all the terms and provisions of, and all the exemptions from liability contained in, the Act of the Congress of the United States approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of other statutes of the United States according carriers by water the protection of limited liability, and to the conditions contained in this bill of lading not inconsistent therewith or with this section.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to call at any port or ports, in or out of the customary route, to tow and be towed, to transfer, trans-ship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

(d) General Average shall be payable according to the York-Antwerp Rules of 1924, Sections 1 to 15, inclusive, and Sections 17 to 22, inclusive, and as to matters not cov-

ered thereby according to the laws and usages of the Port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees and/or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

(e) If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, than as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading.

(f) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or lakes, when performed by or on behalf of rail carriers.

Sec. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enfroceable according to its original tenor.

74 Upon the above and foregoing Special Findings of Fact, the court now states its Conclusions of Law, as follows:

First: That the law is with the defendants and that the plaintiff should take nothing in this action.

Second: That the defendants should recover of and from the plaintiff herein their costs taxed at $.....

Robert C. Baltzell,
Judge U. S. District Court.

July 12, 1939.

75 (Entry continued for July 12, 1939.)

It Is Therefore Ordered, Adjudged and Decreed by the court that the plaintiff take nothing in this action and that the defendants recover of and from the plaintiff their costs herein, taxed at $_____.

76 And afterwards to wit at the May Term of said Court, on the 25th day of September, 1939, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit: Entered July 12, 1939.

Comes now the plaintiff by its attorneys and files notice of appeal, which notice is as follows:

77 In the District Court of the United States Filed Sept. 25, 1939.

For the Southern District of Indiana,

Indianapolis Division.

The Wood Preserving Corporation, *Plaintiff,*

vs.

Department of Treasury of the State of Indiana, M. Clifford Townsend, Peter F. Hein, Lawrence F. Sullivan, as and constituting the Board of the Department of Treasury of the State of Indiana, *Defendants.* } No. 8 Civil.

NOTICE OF APPEAL.

Filed Sept. 25, 1939. Albert C. Sogemeier, Clerk.

Notice is hereby given that The Wood Preserving Corporation, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Seventh Circuit from the final judgment of the Court in this cause to the effect that

the plaintiff take nothing in the action, which judgment was entered on July 12, 1939.

(sgd) Frederick E. Matson,
(sgd) Harry T. Ice,
(sgd) Carelton M. Crick,
Attorneys for Plaintiff-Appellant, The Wood Preserving Corporation.

951 Consolidated Building,
Indianapolis, Indiana.

78 (Entry continued for September 25, 1939.)

And the plaintiff also files appeal bond in the sum of Two Hundred Fifty Dollars ($250.00) with Untied States Guarantee Company as surety, which bond is as follows:

Filed Sept. 25, 1939.

79 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—8)

APPEAL BOND.

Know All Men By These Presents, That we, The Wood Preserving Corporation, as Principal, and United States Guarantee Company, as Surety, are held and firmly bound unto Department of Treasury of the State of Indiana, M. Clifford Townsend, Peter F. Hein, Lawrence F. Sullivan, as and constituting the Board of the Department of Treasury of the State of Indiana, as appellees, in the full and just sum of Two Hundred Fifty Dollars ($250.00) to be paid to said appellees, their successors or assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns, severally by these presents.

Sealed with our seals and dated this 25th day of September, 1939.

Whereas there was rendered at the May Term of the United States District Court for the Southern District of Indiana, Indianapolis Division, in a suit pending in said Court between The Wood Preserving Corporation, plaintiff, and Department of Treasury of the State of Indiana, M. Clifford Townsend, Peter F. Hein, Lawrence F. Sullivan, as and constituting the Board of the Department of
80 Treasury of the State of Indiana, defendants, a judgment against said plaintiff on the 12th day of July,

1939, and the said plaintiff has duly filed a notice of an appeal from said judgment to the United States Circuit Court of Appeals for the Seventh Circuit.

Now therefore, the condition of the above obligation is such that if the said The Wood Preserving Corporation shall prosecute this appeal to effect and pay all costs if the appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award with the judgment being modified, then the above obligation is to be void, otherwise to remain in full force and effect.

The Wood Preserving Corporation,
By Harry T. Ice,
Attorney.

Countersigned By:
Marsh & McLennan, Incorporated,
By Geo. E. Home,
(Seal) *Vice-Pres.*

United States Guarantee Company,
By Carl F. Eilert,
attorney-in-fact.
Robert E. Powell
attorney-in-fact.

81 (Entry continued for September 25, 1939.)

And the plaintiff also files statement of points, which is as follows:

82 In the District Court of the United States. Filed Sept. 25, 1939.
(Caption—8)

STATEMENT OF POINTS.

The plaintiff-appellant, pursuant to Rule 75(d) of the Rules of Civil Procedure for the District Courts of the United States, now makes this concise statement of the points on which plaintiff-appellant intends to rely on the appeal.

Plaintiff, as appellant on appeal, will rely upon the following points as supporting its contention that the Court committed error in its conclusions of law and in the entry of judgment on July 12, 1939, against plaintiff-

appellant, denying to plaintiff-appellant recovery of the sums sought in the complaint.

Point One. Plaintiff-appellant should have recovered the sums sought, for the reason that the sums represent a tax imposed upon receipts derived from business conducted in commerce between this State and other States of the United States, which under the terms and provisions of Section 6(a) of the Gross Income Tax Act of Indiana is exempt from taxation (Section 6(a), Chapter 50, Acts of 1933; Section 6(a), Chapter 117 of the Acts of 1937).

Point Two. Plaintiff-appellant should have recovered the sums sought, for the reason that the sums represent a tax imposed upon receipts derived from business conducted in commerce between this State and other States of the United States, and if said receipts are not exempt under the provisions of Section 6(a) of said Act, then said Act is invalid and void and said assessment
83 illegal as to such receipts for the reason that the tax assessed constitutes a regulation of and a burden upon commerce between the State of Indiana and other States of the United States, in conflict with Article I, Section 8, of the Constitution of the United States.

Point Three. Plaintiff-appellant should have recovered the sums sought, for the reason that the sums represent a tax imposed upon receipts which were not received by plaintiff-appellant within the State of Indiana; such receipts therefore are not subject to the provisions of said gross income tax act, as no taxable event occurred in Indiana, and the imposition of a tax upon such receipts constitutes a denial to plaintiff-appellant of the due process of law, and such tax is illegal and void as being in conflict with the Fourteenth Amendment of the Constitution of the United States.

Point Four: Plaintiff-appellant should have recovered the sums sought, for the reason that the sums represent a tax imposed upon receipts derived from activities and business, a large portion of which was carried out by services and functions performed in States other than the State of Indiana, and the imposition of a tax upon all of the receipts, without allocation as to services and functions performed within and without the State of Indiana, constitutes a denial to plaintiff-appellant of due process of

law, and such tax is illegal and void, as being in conflict with the Fourteenth Amendment of the Constitution of the United States.

Respectfully submitted,
Frederick E. Matson,
Harry T. Ice,
Carleton M. Crick,
Attorneys for Plaintiff-Appellant.

84 (Entry continued for September 25, 1939.)

And the parties also file stipulation as to record, which stipulation is as follows:

85 In the District Court of the United States. Filed Sept. 25, 1939.
(Caption—8)

STIPULATION AS TO RECORD.

It Is Hereby Stipulated between the parties in the above-entitled cause, and pursuant to Rule 75(f) of the Rules of Civil Procedure for the District Courts of the United States, that instead of serving designations of the record as provided for in the aforesaid Rules, the parties do now designate the following parts of the record, proceedings and evidence to be included in the record on appeal, and the same shall be prepared by the Clerk of the Court for use on such appeal to the United States Circuit Court of Appeals for the Seventh Circuit:

1. Bill of complaint;
2. All appearances for defendants;
3. Answers of defendants;
4. Finding of facts;
5. Conclusions of law;
6. Final judgment entered July 12, 1939;
7. All order book entries in said cause not enumerated herein;
8. Notice of appeal;
9. Appeal bond;
10. This stipulation as to the designation of parts of the record;

11. Plaintiff's statement of points to be relied upon;
12. Clerk's certificate to transcript of record.

86 In Witness Whereof we have hereunto set our hands this 25th day of September, 1939.

Frederick E. Matson,
Harry T. Ice,
Carleton M. Crick,
Attorneys for Plaintiff-Appellant, The Wood Preserving Corporation.
Joseph W. Hutchinson,
Joseph L. McNamara,
Attorneys for Defendants-Appellees, Department of Treasury of the State of Indiana, M. Clifford Townsend, Peter F. Hein, Lawrence F. Sullivan, as and constituting the Board of the Department of Treasury of the State of Indiana.

87 United States of America,
Southern District of Indiana, } ss.
Indianapolis Division.

I, Albert C. Sogemeier, Clerk of the United States District Court in and for the Southern District of Indiana, do hereby certify that the above and foregoing is a true and full transcript of the records and proceeding in the cause of The Wood Preserving Corporation *vs.* Department of Treasury of the State of Indiana, et al., No. 8 Civil, according to the stipulation as to record filed September 25, 1939, now remaining among the records of said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Indianapolis, this 29th day of September, 1939.

Albert C. Sogemeier,
(Seal) *Clerk, United States District Court, Southern District of Indiana.*

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the printed record, printed under my supervision and filed on the twenty-fourth day of November, 1939, in the following entitled cause:

Cause No. 7126.

The Wood Preserving Corporation,
Plaintiff-Appellant,

vs.

Department of Treasury of the State of Indiana, *et al.*,
Defendants-Appellees,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 12th day of December, A. D. 1940.

Kenneth J. Carrick,
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

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At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit held in the City of Chicago and begun on the third day of October, in the year of our Lord one thousand nine hundred and thirty-nine, and of our Independence the one hundred and sixty-fourth.

The Wood Preserving Corporation,
Plaintiff-Appellant,
7126 *vs.*
Department of Treasury of the State of Indiana, *et al.*,
Defendants-Appellees.

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

And, to-wit: On the thirty-first day of October, 1939, there was filed in the office of the Clerk of this Court, an appearance of counsel for appellant, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

No. 7126. October Term, 19.....

The Wood Preserving Corporation,
Plaintiff-Appellant,

vs.

Department of Treasury of the State of Indiana, *et al.*,
Defendant-Appellee.

The Clerk will enter my appearance as counsel for the Defendant-Appellee.

Joseph W. Hutchinson,
Joseph P. McNamara,
Attorney General's Office,
219 Statehouse,
Indianapolis, Ind.

Endorsed: Filed Oct. 31, 1939. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the twenty-seventh day of November, 1939, there was filed in the office of the Clerk of this Court, an appearance of counsel for appellee, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

No. 7426. October Term, 19.....

The Wood Preserving Corporation,
Plaintiff-Appellant,

vs.

Department of Treasury of the State of Indiana, *et al.*,
Defendant-Appellee.

The Clerk will enter my appearance as counsel for the Plaintiff-Appellant.

Frederick E. Motson,
Harry T. Ice,
951 Consolidated Bldg.,
Indianapolis, Ind.

Endorsed: Filed Nov. 27, 1939. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the tenth day of June, 1940, the following further proceedings were had and entered of record, to-wit:

Monday, June 10, 1940.

Court met pursuant to adjournment.

Before:

Hon. William M. Sparks, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Walter C. Lindley, District Judge.

The Wood Preserving Corporation,
Plaintiff-Appellant,
7126 *vs.*
Department of Treasury of the State of Indiana, *et al.*,
Defendants-Appellees.

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

Now this day come the parties by their counsel and this cause comes on to be heard on the transcript of the record and briefs of counsel and on oral argument by Mr. Frederick E. Matson, counsel for appellant, and by Mr. Joseph P. McNamara and Mr. Joseph W. Hutchinson, counsel for appellees, and the Court having heard the same takes this matter under advisement.

And afterwards, to-wit: On the twentieth day of July, 1940, there was filed in the office of the Clerk of this Court, an opinion of the Court, which said opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

No. 7126. October Term, 1939, April Session, 1940.

THE WOOD PRESERVING CORPORATION,
Plaintiff-Appellant,
vs.
DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, *Et Al.*,
Defendants-Appellees.

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

July 20, 1940.

Before SPARKS and MAJOR, *Circuit Judges*, and LINDLEY, *District Judge*.

MAJOR, *Circuit Judge*. This is an appeal from a judgment against the plaintiff in an action to recover taxes collected by defendants under the Indiana Gross Income Tax Act of 1933. (Chap. 50, Indiana Acts 1933, Burns Statutes Annotated, 1933, Sec. 64—2601 *et seq.*) The court adopted the "stipulation of findings" filed by the parties as its special findings of fact, and stated its conclusions thereon. The errors relied on arise out of the court's conclusions of law.

The facts, as found by the court, are lengthy, and while not in dispute, it seems essential to state a resumé of the same in order properly to consider the questions of law presented.

All the gross receipts in question were received by plaintiff during 1934, 1935 and 1936 (the taxable years), from the sale of cross-ties furnished to the Baltimore and Ohio Railroad Company pursuant to certain contracts and course

of dealings had between the parties. One contract was between Central Creosoting Company of Delaware, operating a treatment plant[1] at Finney, Ohio, and the railroad, a Maryland Corporation, with main offices at Baltimore, Maryland, executed December 21, 1922, which, prior to 1933, was assigned to National Lumber and Creosoting Company. Subsequently, but prior to 1933, plaintiff acquired control of this company and operated it as a subsidiary. By this contract, the railroad was required to deliver annually to the plant at Finney, Ohio, a minimum of 600,000 ties for treatment. The railroad had another contract with the Joyce-Watkins Company of Illinois, which operated a treatment plant, owned by the railroad, at Green Springs, West Virginia. This contract was assigned by Joyce-Watkins to plaintiff March 1, 1933, and provided terms by which plaintiff was to purchase and sell ties to the railroad and operate the plant. Before plaintiff commenced operations, a supplemental agreement was made between the railroad and the plaintiff, accepted and followed by the plaintiffs during the taxable years, that all ties originating at points on the railroad west of the Ohio River (including Indiana), should be shipped by plaintiff to Finney, Ohio.

Plaintiff is a Pennsylvania corporation with its main office at Pittsburgh. Its office from which its tie business was operated was at Marietta, Ohio. It maintained no office in Indiana, but was qualified to do business in that state where it had a statutory agent for service of process. The railroad company, when it desired ties—in conformity with the Joyce-Watkins contract—through its purchasing agent at Baltimore, Maryland, telephoned plaintiff's Marietta office, stating the number of ties wanted and the price it would pay delivered f. o. b. cars at loading point. Plaintiff's Marietta office would then send a price list circular to producers of ties in its territory, including Indiana, which contained specifications, prices to be paid on the ground at loading point, and the information that plaintiff would pay additional for loading ties on the cars. In response to this price circular, the producers would notify plaintiff at its Marietta office by mail, telephone or telegraph of the quantity, type and quality of ties they could furnish, as

1. A treatment plant is one in which the raw ties are creosoted or otherwise treated prior to use by the railroad. Plaintiff's compensation for such service was not included in, and forms no part of, the gross income involved in this litigation.

well as the nearest loading point. Ties were delivered to such point by the producers, where an agent of the plaintiff, assigned from its Marietta office, and an inspector for the railroad, would go. The ties were examined by the railroad inspector and accepted or rejected. If accepted, they were loaded upon a car of the railroad at plaintiff's expense.

At the end of each day, the railroad inspector would make out a report of ties accepted, and give a copy to plaintiff's agent. On the basis of this report, plaintiff's agent each day paid the producer by sight draft on banks outside the state, for ties accepted by the railroad. The producer received no pay for ties rejected. When loading was completed, plaintiff's agent made out a uniform bill of lading showing plaintiff as consignor, consigning the ties to the railroad in care of its chief engineer of maintenance at Finney, Ohio. Plaintiff paid no freight for transporting the ties. Plaintiff's agent then sent to its Marietta office a copy of the railroad inspector's report of ties accepted and loaded, a copy of the draft used in paying the producer, and a shipping report showing the number and type of ties delivered to the railroad, the number of the car and the billing to Finney, Ohio. The agent also sent to the Finney, Ohio treatment plant, copies of the same papers; and to the railroad office at Baltimore, Maryland, a copy of the billing of the car to its chief engineer of maintenance at Finney, Ohio. At the end of each week, plaintiff's Marietta office made out and sent to the railroad at its Baltimore office, an invoice of ties sold and delivered to it during the previous week. At the end of each month, plaintiff's Marietta office sent its Pittsburgh office a statement showing all invoices rendered the railroad during the month for ties loaded in Indiana and shipped to Finney, Ohio. All ties purchased from plaintiff by the railroad during the taxable years were delivered to Finney, Ohio for treatment. All office and bookkeeping functions connected with these transactions were performed at plaintiff's office in Marietta, Ohio, and Pittsburgh, Pennsylvania.

No payments for ties were received by plaintiff in Indiana. They were all made by the railroad from its Baltimore office and sent to plaintiff at its office in Pittsburgh, Pennsylvania, and deposited by plaintiff in its Pittsburgh bank. It is the income thus received about which the controversy in the instant case revolves.

The contested issues are not in dispute and, as stated by plaintiff, are:

1. Whether the gross income taxes herein sought to be recovered are invalid as in violation of the due process clause of the 14th Amendment to the Federal Constitution, because laid upon a taxable event—the receipt of gross income—which occurred outside the territorial limits of Indiana and beyond the jurisdiction of the taxing authorities.

2. Whether the gross income taxes herein sought to be recovered are invalid as in violation of the due process clause of the 14th Amendment to the Federal Constitution, because laid without allocation or apportionment upon business activities both without and within the territorial limits of Indiana and, as to activities outside the state, beyond the jurisdiction of the taxing authorities.

3. Whether the gross income taxes herein sought to be recovered are invalid as in violation of the commerce clause, Article I, Section 8, of the Federal Constitution, because laid upon receipts derived from interstate commerce, constitute a direct burden upon such commerce and are of a type which subjects the commerce to the risk of multiple taxation of like kind in other states.

The solution of the first contested issue depends upon an answer to the question—What was the taxable event? It is contended by the plaintiff that the event was the receipt of gross income which occurred in Pennsylvania. If this position is sound, it is evident—in fact, not disputed—that the State of Indiana was without power to levy and collect the tax. It is defendants' contention, as stated in their brief, that "the thing which the Statute authorizes as the taxable event, the thing which was taxed, is the transaction which occurs within Indiana involved in one of two things, either doing business within the state or deriving income from a source within the state." Under this theory, the gross income received in Pennsylvania is merely the measure for the tax.

It is at once apparent that the respective contentions require a construction of the Statute relied upon as authority for the tax. The Act is entitled "An Act to provide for the raising of public revenue by imposing a tax upon the receipt of gross income. * * *" Section 1 pro-

vides that this Act may be cited as the "Gross Income Tax Act of 1933." Section 2 of the Act, the one in controversy, provides:

> "There is hereby imposed a tax, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the entire gross income of all residents of the State of Indiana, and upon the gross income derived *from sources* within the State of Indiana, of all persons and/or companies, including banks, who are not residents of the State of Indiana, but are engaged in business in this state, or who derive gross income from sources within this state, and shall be in addition to all other taxes now or hereafter imposed with respect to particular occupations and/or activities * * *"

Section 3 provides the applicable rates "upon the entire gross income of every person * * *"

This Act has been construed by the Supreme Court in *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307. There, the taxpayer, an Indiana corporation, was a manufacturer of road machinery and equipment, and maintained its home office, principal place of business, and factory in the state. A good part of its products was sold to customers in states other than Indiana. Payments for its products were remitted to the home office. The case reached the Supreme Court by appeal from the Supreme Court of Indiana which had construed the tax to be "upon the privilege of domicile, and transacting business, and receiving gross income within the state, and measured by the amount of gross income." This construction was reversed by the Supreme Court of the United States. The court points out (page 310) that it is not a tax on the transaction of business, nor a charter or franchise tax, nor a tax upon the privilege of producing or manufacturing within the state, but said: (page 311) "We conclude that the tax is what it purports to be,—a tax upon gross receipts from commerce." The court, on the same page, also said:

> "The regulations issued by the Department of the Treasury, pursuant to authority granted by the Act, treat the exaction as a gross receipts tax; and the Attorney General says in his brief that it is a privilege tax upon the receipt of gross income. We think this is a correct description."

The distinction sought to be made by defendants between the Adams case and the instant one is, that in the former the taxpayer was a resident of the state, while in the latter the taxpayer is a non-resident, and that, therefore, the language of the Act "such tax shall be levied * * * upon the gross income derived from sources within the State of Indiana * * *, engaged in business in this state, or who derive gross income from sources within this state," upon which the instant tax is predicated, was not before the Supreme Court in the Adams case and, therefore, that case is not controlling.

The distinction sought to be made, if sustained, leads to the result that two separate and distinct "taxing events" are contemplated by the Act, (1) where the gross income is received by a resident, and (2) where gross income is received by a non-resident. As to the former, the court held the taxable event to be "the receipt of gross income." It is here argued by the defendants that the taxable event is not the receipt of gross income, but the privilege of doing business or deriving income from a source within the state. Defendants insist that the plain language of the Act requires such a construction. We do not agree. As the Supreme Court pointed out in the Adams case (page 309), "the title of the Act declares that it is a revenue measure imposing a tax upon 'the receipt of gross income.' The Statute defines gross income as meaning the gross receipts derived from trades, businesses or commerce." It seems certain that the title of the Act applies to non-residents as well as residents. All through the Act the tax is referred to as one upon "gross income." The regulations of the Treasury Department (footnote, Adams case, page 311) clearly treat the taxable event as "gross income received." It appears to us that the non-resident provision of the Act, upon which defendants rely, was intended to apply to persons, not legal residents of the State, but living temporarily, or engaged in business in the state and receiving income there. That construction is consistent with the title and terms of the Act, as well as the interpretation placed thereon by the Supreme Court in the Adams case. On the other hand, the construction sought by defendants is inconsistent therewith. Defendants rely strongly upon *Equitable Life Society* v. *Pennsylvania*, 238 U. S. 143, as sustaining their contention. There the tax related to premiums received by insurance companies. The company contended it was a tax on property, but the Act was con-

strued both by the State Court and the Supreme Court as "levying a tax for the privilege of doing business within the commonwealth." The tax was sustained in that case on a theory similar to that adopted by the court in *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459, where the tax was laid on the privilege of pursuing the occupation of a manufacturer in the City of St. Louis. This latter case was referred to, and distinguished by the Court in, the Adams case (page 312).

Concluding as we do, that the thing taxed in the instant case was "the receipt of gross income," it follows that such income received by plaintiff in Pennsylvania was beyond the jurisdiction of the State of Indiana to tax, and that the collection of such tax was unconstitutional and void. *Safe Deposit and T. Co.* v. *Virginia*, 280 U. S. 83, 92; *Curry* v. *McCanless*, 307 U. S. 357, 366.

Under the second contested issue, it is contended by the plaintiff that the tax is invalid because laid without allocation or apportionment upon business activities both within and without the State of Indiana. Defendants meet this contention by asserting that plaintiff's income was derived from business engaged in, and from a source within Indiana, and that there was nothing to apportion. The conflicting views under this issue arise from a disagreement as to the factual situation rather than legal conclusions. We think it has been held generally that before a valid tax can be laid upon a business conducted in, or source of income received from more than one state, there must be an allocation or apportionment of that portion of the business done in, or source of income received from, the taxing state. *Adams Mfg. Co.* v. *Storen, supra*, 314; *Gwin, etc., Inc.* v. *Henneford*, 305 U. S. 434, 439. The question which naturally arises and is determinative of this issue is, whether the receipt by plaintiff of gross income was derived from business engaged in and from a source within the State of Indiana. Defendants contend that the only transaction involved was plaintiff's sale and delivery in Indiana of raw, untreated cross-ties to the railroad. If this be true, it follows that the cases which stand for the apportionment theory, are without application.

We are of the opinion, however, that defendants' contention in this respect is not tenable. We have stated heretofore the facts concerning the transactions constitut-

ing the source of income and shall not repeat. It is sufficient to point out that a sizable portion of the business affording the source of income, was transacted outside the State of Indiana, both before and subsequent to the actual delivery of the ties to the railroad. It is true, the immediate receipt of the income was from the sale of the ties, which took place in Indiana, but what took place there was merely a culmination of contracts and transactions entered into outside of that state. Had it not been for such contracts and transactions, it appears there would have been no source of income in Indiana or elsewhere. That such outside transactions contributed materially to the source of income within the state, there is little, if any, room for doubt. To think otherwise is to close our eyes to the realities of the situation and view the business and transactions of the parties as consisting only of the delivery of the ties. It is our conclusion, therefore, that the source of income was not confined to transactions occurring in Indiana, but was contributed to largely by transactions occurring in other states. Therefore, the situation comes within those authorities which hold that an apportionment is required.

Nor do we think, as argued, that the burden is upon the taxpayer to make an apportionment. It would seem more reasonable to think that it is incumbent upon the state, which seeks to impose the tax, to provide a method of determining that portion of the income derived from transactions occurring within the state. In *Hans Rees' Sons* v. *North Carolina*, 283 U. S. 123, 133, the court discusses a similar question and appears to recognize that the burden is upon the state to adopt a method which will be sustained in absence of proof that it is unreasonable or arbitrary. (See cases cited and discussed in *Gwin, etc., Inc.* v. *Henneford*, 305 U. S. 434, at 438-441.)

Assuming that defendants' theory as to the "taxable event" is sound (we have held to the contrary), yet we are of the opinion that the tax as laid is invalid because no method is provided by the Act or otherwise for allocating the tax to the income derived from that part of the business transacted in Indiana.

The third contested issue is closely related to the second, and much of what has been said concerning the latter is applicable. The defendants' position is again predicated on the theory that the gross income used as the tax meas-

ure, was the result of intra-state transactions independent of interstate commerce, or if related to interstate commerce, in a manner such as to place no substantial burden thereon.

Here also, we think defendants' argument is based upon an erroneous appraisement of the activities which entered into the transactions providing the source of income. As stated heretofore, we are of the opinion that the transactions which occurred in Indiana constituted merely a portion of the business in which the parties were engaged. Defendants stress the argument that the ties were delivered to the purchaser (railroad) in Indiana to be used by the railroad company as it saw fit, and without cost of transportation to the plaintiff. In this connection, it is argued that title passed to the railroad at the time of delivery and that the plaintiff no longer had any control or dominion over the ties.

This argument, however, ignores what we think the facts disclose—that is, that the plaintiff and the railroad were obligated by contracts, the former to purchase the ties and deliver them to the railroad for the purpose of transportation into another state to a treatment plant in which plaintiff had a controlling interest, and the latter to make such transportation. Under these circumstances, we do not think it is material, and certainly not controlling, as to whether the railroad acquired title at the point where the ties were received in Indiana, or at the point in Ohio where they were consigned by the plaintiff and received by the maintenance department of the railroad. *Spalding & Bros.* v. *Edwards*, 262 U. S. 66, 70; *Santa Cruz Co.* v. *Labor Board*, 303 U. S. 453, 463. Even if the carrier acquired title at the receiving point, with the technical right to ship where it pleased or to use the ties otherwise than as intended, it would not change the situation. As was said in discussing a similar contention in *Spalding & Bros., supra*, page 70:

> "* * * There was not the slightest probability of any such change and it did not occur. * * * Theoretical possibilities may be left out of account."

In the instant case the parties, without deviation, followed the same course of conduct during the taxable years. If we are correct in our premise that the parties were doing business under a contract obligation, the statement

of the court in *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506, 515, seems pertinent. The court said:

> "* * * They were in effect contracts for the sale and delivery of the oil across state lines. The soliciting of orders for such sales is equally exempt. Such transactions are interstate commerce in its essence and any state tax upon it is a regulation of it and a burden upon it. (Citing cases.)"

The loading of the ties upon the railroad car for the purpose of transportation to another state was in itself an act of interstate commerce. In *Puget Sound Co.* v. *Tax Commission*, 302 U. S. 90, 94, the court said:

> "The business of loading and unloading being interstate or foreign commerce, the State of Washington is not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts. Decisions to that effect are many and controlling. * * *"

Defendants place great reliance upon the case of *Superior Oil Co.* v. *Mississippi*, 280 U. S. 390. A study of this case, however, is convincing that it has little, if any, relevancy to the instant situation. There the State of Mississippi sought to collect a tax upon gasoline sent by the oil company to packers of sea food located in the same state. The latter, after receipt of the gasoline, were free to dispose of it as they saw fit. After its receipt, the gasoline was loaded on their own boats and carried to fishermen across the state line in Louisiana. It was contended that this course of dealing was known to the oil company, and, in addition, when delivery was made to the packers, it took back from the latter a so-called bill of lading reciting that the property continued to be the property of the oil company until its delivery in Louisiana. The court labeled this document as an effort (page 394) "* * * to try to convert a domestic transaction into one of interstate commerce. There was no consignee at the point of destination. The goods were delivered to the so-called consignee before they started, and were in its hands throughout. * * *" Again the court, (page 395) said: "* * * But here the gasoline was in the hands of the purchaser to do with as it liked, and there was nothing that in any way committed it to sending the oil to Louisiana except its own wishes. * * * The only purpose of

the vendor here was to escape taxation. * * *" Such a situation has little similarity to that of the instant case where the parties were engaged in bona fide transactions in conformity with contractual obligations, as well as with long usage and custom. Here there is not even a suspicion of an effort to avoid taxation. In fact, the same course of business had been followed by the parties continuously since a period prior to the enactment of the Act in question.

A case very much discussed in the briefs by parties for both sides is that of *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282. There, by contracts made in Kentucky, a farmer agreed to sell wheat to Dahnke-Walker and deliver it f.o.b. cars at the farmer's home in Kentucky. The wheat was paid for there, and title passed to the purchaser when the wheat was loaded on the cars. Afterwards, the seller had no control or dominion over the wheat. Thus, the entire transaction of purchase and sale, including delivery, payment, and passage of title—all occurred in Kentucky. It was shown, however, that by the course of business in prior years, the wheat was intended to go to Tennessee for treatment at the purchaser's mill. That had been the practice and custom in the past, and was known to both parties. The court held the transaction to be interstate commerce on the principle that (page 290) "* * * where goods are purchased in one state for transportation to another the commerce includes the purchase quite as much as it does the transportation. * * *" The fact is stressed (page 292) "* * * that the delivery was to be on board the cars and that the plaintiff, in continuance of its prior practice, was purchasing the grain for shipment to its mill in Tennessee. * * *" The facts of the present case are stronger in favor of interstate commerce. Here, all payments were made and received out of the state and the purchaser, even if title passed at the loading point, could not have prevented the ties from going to Finney, Ohio, without violating its contract to deliver them there for treatment. Here also, both parties had an interest in transporting the ties from Indiana to Finney, Ohio.

Defendants seek to distinguish the *Dahnke-Walker* case in two ways, (1) that in the instant case the purchaser (railroad) was the common carrier, while in the *Dahnke-Walker* case the carrier was a third party, and (2) in that case the court was not concerned with the power to tax,

but with the power to regulate. As to (1), we think it has been held generally that the fact that the carrier is itself the owner of the property being transported, is a circumstance only to be considered in determining the nature of the commerce. In no case, so far as we are aware, has it been held conclusive. The Pipe Line Cases, 234 U. S. 548, 560; *United Fuel Gas Co.* v. *Hallanan*, 257 U. S. 277, 281; *Standard Oil Co.* v. *Johnson*, 92 Pac. (2d) 470, 472-473. As to (2), it is true the court in *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506, 514, called attention to the fact that the *Dahnke-Walker* case was not concerned with the power to tax, but we know of no case where such distinction has been given application. The court made no such distinction in *Minnesota* v. *Blasius*, 290 U. S. 1, which was a revenue case. After citing the *Dahnke-Walker* and other cases, the court, on page 9, said:

> "* * * Thus, the States cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it. Similarly, the States may not tax property in transit in interstate commerce. * * *"

True, the court sustained the tax on the proposition that the transportation claimed to be interstate had ceased and was no longer protected by the commerce clause. No distinction was made, however, between the power to tax and the power to regulate such commerce.

We reach the conclusion that the transactions in question were had in interstate commerce. It does not always follow, however, that interstate commerce is immune from taxation. *Western Live Stock* v. *Bureau*, 303 U. S. 250, 254-255; *Gwin, etc., Inc.* v. *Henneford*, 305 U. S. 434, 438. Both of these cases, however, stand for the rule often announced, that state taxation, whatever its form, is precluded if it discriminates against interstate commerce.

If we are correct in our conclusions thus far, we think it must be held that the tax in question so discriminates. It appears plausible that the State of Ohio, wherein plaintiff's business was largely conducted, and where a portion of the transactions were had giving rise to the income received, could impose a similar tax, and more certain that the State of Pennsylvania, where the income was actually received, could do likewise. In *Gwin, etc., Inc.* v. *Henne-*

ford, supra, the court, in considering a situation similar to the instant one, on page 439, said:

> "* * * If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. * * *"

It is our conclusion, therefore, that the tax in question discriminates against interstate commerce, and for that reason is void. *Adams Mfg. Co.* v. *Storen, supra.*

The judgment of the District Court is

REVERSED.

LINDLEY, *District Judge,* Dissenting:

The Indiana statute imposes a tax upon the gross income of all residents of the state and upon the gross income, "derived from sources within the state," of non-residents engaged in business in the state or "who derive gross income from sources within the state." Here the income sought to be taxed arose from the delivery in Indiana by the seller to the buyer of railroad ties produced in Indiana, in pursuance of orders received from outside the state. Title passed from the seller to the purchaser upon delivery within Indiana and the income received by the seller arose solely from sources within the state. The tax is clearly assessable under the statute unless it is a discrimination against or constitutes a burden upon interstate commerce.

A non-discriminatory tax upon articles eventually destined for interstate commerce, even though ordered from without the state, where the transaction is completed within the state, does not, it seems to me, under the decisions of the Supreme Court, amount to undue discrimination against, interference with, or burden upon, interstate commerce.

I have fully stated my reasons for this conclusion in my dissent in *Nudelman* v. *Globe Varnish Company.* As said there, the question presented is not one of the power or extent of the power of the Congress to regulate interstate commerce. Rather, it is a question of whether a tax upon income, clearly derived from sources within the state, constitutes discrimination against interstate commerce even though measured by the same yardstick as the tax upon

income of residents,—whether it is removed from the non-discriminatory category by the fact that the articles are intended eventually to pass into interstate commerce. An affirmative conclusion, it is my conviction, is not justified under the decisions of the Supreme Court.

The doctrine of apportionment is in no wise applicable. The income involved arose entirely from sources within the state. Hence there is nothing to apportion between Indiana and other states.

I think the judgment should be

AFFIRMED.

Endorsed: Filed July 20, 1940. Kenneth J. Carrick, Clerk.

And on the same day, to-wit: On the twentieth day of July, 1940, the following further proceedings were had and entered of record, to-wit:

Saturday, July 20, 1940.

Court met pursuant to adjournment.
Before:

Hon. William M. Sparks, Circuit Judge
Hon. J. Earl Major, Circuit Judge
Hon. Walter C. Lindley, District Judge

The Wood Preserving Corporation *Plaintiff-appellant,* vs. Department of Treasury of the State of Indiana, *et al.,* *Defendants-appellees.*	Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

7126

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed, with costs; and that this cause be, and the same is hereby, remanded to the said District Court.

And afterwards, to-wit: On the second day of August, 1940, there was filed in the office of the Clerk of this Court, a petition for a rehearing which said petition for a rehearing is not copied here.

And afterwards, to-wit: On the tenth day of August, 1940, there was filed in the office of the Clerk of this Court, an answer to petition for a rehearing which said answer is not copied here.

And afterwards, to-wit: On the fifth day of October, 1940, the following further proceedings were had and entered of record, to-wit:

Saturday, October 5, 1940.

Court met pursuant to adjournment.

Before:

Hon. William M. Sparks, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Walter C. Lindley, District Judge.

The Wood Preserving Corporation,
Plaintiff-Appellant,
7126 *vs.*
Department of Treasury of the State of Indiana, *et al.*,
Defendants-Appellees.

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

It is ordered by the Court that the petition for a rehearing of this cause be, and it is hereby, denied.

And afterwards, to-wit: On the ninth day of October, 1940, there was filed in the office of the Clerk of this Court, a motion for stay of issuance of mandate, which said motion is in the words and figures followng, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,

Seventh Circuit.

The Wood Preserving Corporation,
Plaintiff-Appellant,
vs.
Department of Treasury of the State of Indiana, M. Clifford Townsend, Peter F. Hein, Lawrence F. Sullivan, as and constituting the Board of Department of Treasury of the State of Indiana,
Defendants-Appellees.
No. 7126.

MOTION FOR STAY OF ISSUANCE OF MANDATE.

The appellees, Department of Treasury of the State of Indiana, M. Clifford Townsend, Peter F. Hein, Lawrence F. Sullivan, as and constituting the Board of Department of Treasury of the State of Indiana, now move the Court to enter an order withholding the mandate in this case because it is the bona fide intention of the appellees to make a proper application to the Supreme Court of the United States for a Writ of Certiorari in this case, and in support of this motion, the appellees attach the professional statement of its counsel.

Samuel D. Jackson,
Samuel D. Jackson,
Attorney General of Indiana,
Joseph W. Hutchison,
Joseph W. Hutchison,
Deputy Attorney General,
Joseph P. McNamara,
Joseph P. McNamara,
Deputy Attorney General,
Counsel for Appellees.

I, Joseph W. Hutchinson, certify that it is the bona fide intention of the appellees in the above-entitled case to make an application to the Supreme Court of the United States for a Writ of Certiorari within the time limited by law, and, I believe there is merit in appellees' case and that the judgment of the United States Circuit Court of Appeals for the Seventh Circuit in said case

ought to be reversed by the Supreme Court of the United States.

Dated this 8th day of October, 1940.

Joseph W. Hutchinson.
Joseph W. Hutchinson.
Indianapolis, Indiana.

The Wood Preserving Corporation, appellant, by its counsel, acknowledges service of above Motion for Stay of Mandate and receipt of copy of said Motion on October 8, 1940. On Octber 8, 1940, the undersigned was informed of said Motion and notified that it would be filed at once.

Matson, Ross, McCord & Ice,
By Harry T. Ice,
Attorneys for Appellant.

Endorsed: Filed Oct. 9, 1940, Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the sixteenth day of October, 1940, the following further proceedings were had and entered of record, to-wit:

Thursday, October 16, 1940.

Court met pursuant to adjournment.

Before:

Hon. J. Earl Major, Circuit Judge.

The Wood Preserving Company,
Plaintiff-appellant,
7126 *vs.*
Department of Treasury of the State of Indiana, *et al.*,
Defendants-appellees.

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

On motion of counsel for appellees, it is ordered that the mandate of this Court in this cause be, and it is hereby, stayed pursuant to Rule 25 of the rules of this Court.

And afterwards, to-wit: On the fourteenth day of November, 1940, there was filed in the office of the Clerk of this Court, motion for further stay of mandate, which said motion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

Seventh Circuit.

The Wood Preserving Corporation,
Plaintiff-Appellant,
vs.
Department of Treasury of the State of Indiana, M. Clifford Townsend, Peter F. Hein, Lawrence F. Sullivan, as and constituting the Board of Department of Treasury of the State of Indiana,
Plaintiff-Appellant,
} No. 7126.

MOTION FOR STAY OF ISSUANCE OF MANDATE

The appellees, Department of Treasury of the State of Indiana, M. Clifford Townsend, Peter F. Hein, Lawrence F. Sullivan, as and constituting the Board of Department of Treasury of the State of Indiana, now move the Court to enter an order further withholding the mandate in this case because it is the bona fide intention of the appellees to make a proper application to the Supreme Court of the United States for a Writ of Certiorari in this case, and appellees now respectfully represent that numerous other engagements and the preparation of other briefs have prevented the appellees from perfecting their application to the Supreme Court of the United States for a Writ of Certiorari within the time that the mandate was originally stayed by this Court, and in support of this motion the appellees attach the professional statement of its counsel.

Samuel D. Jackson,
Samuel D. Jackson,
Attorney General of Indiana,
Joseph W. Hutchinson,
Joseph W. Hutchinson,
Deputy Attorney General,
Joseph P. McNamara,
Joseph P. McNamara,
Deputy Attorney General,
Counsel for Appellees.

I, Joseph P. McNamara, certify that it is the bona fide intention of the appellees in the above-entitled case to make an application to the Supreme Court of the United States for a Writ of Certiorari within the time limited by law, and I believe there is merit in appellees' case and that the judgment of the United States Circuit Court of Appeals for the Seventh Circuit in said case ought to be reversed by the Supreme Court of the United States.

Dated this thirteenth day of November, 1940.

Joseph P. McNamara.

Joseph P. McNamara.

Indianapolis, Indiana.

The Wood Preserving Corporation, appellant, by its counsel, acknowledges service of above Motion for Stay of Mandate and receipt of copy of said Motion on November 13, 1940. On November 13, 1940, the undersigned was informed of said Motion and notified that it would be filed at once.

Frederick E. Matson,
Harry T. Ice,
Attorneys for Appellant.

Endorsed: Filed Nov. 14, 1940. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the fifteenth day of November, 1940, the following further proceedings were had and entered of record, to-wit:

Friday, November 15, 1940.

Court met pursuant to adjournment.

Before:

Hon. J. Earl Major, Circuit Judge.

The Wood Preserving Corporation, *Plaintiff-appellant,* vs. Department of Treasury of the State of Indiana, *et al.*, *Defendants-appellees.*	Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

7126

It is ordered that the motion of counsel for appellees for a further stay of issuance of the mandate of this Court in this cause be, and it is hereby, granted.

And afterwards, to-wit: On the twentieth day of November, 1940, there was filed in the office of the Clerk of this Court, a praecipe for record, which said praecipe is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

Seventh Circuit

The Wood Preserving Corporation,
Plaintiff-Appellant,
vs.
Department of Treasury of the State of Indiana, M. Clifford Townsend, Peter F. Hein, Lawrence F. Sullivan, as and constituting the Board of Department of Treasury of the State of Indiana,
Defendants-Appellees.
No. 7126.

To the Honorable Kenneth J. Carrick,
Clerk, U. S. Circuit Court of Appeals for the Seventh Circuit,
1212 Lake Shore Drive,
Chicago, Illinois.

The defendants-appellees in the above cause respectfully request that you prepare for use in the presentation of a petition for certiorari a true and complete copy of the record in the above entitled cause, including but not in limitation thereof, a copy of the printed record filed in the United States Circuit Court of Appeals in said cause, and a full, true and complete copy of the proceedings had in said Circuit Court of Appeals, certified under your hand and the seal of the Court.

Samuel D. Jackson,
Samuel D. Jackson,
Attorney General of Indiana,
Joseph W. Hutchinson,
Joseph W. Hutchinson,
Deputy Attorney General,
Joseph P. McNamara,
Joseph P. McNamara,
Deputy Attorney General,
Attorneys for Defendants-Appellees.

Endorsed: Filed Nov. 20, 1940. Kenneth J. Carrick, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the proceedings had and papers filed (excepting briefs of counsel, and petition for leave to two counsel to argue cause, and order thereon) in the following entitled cause:

Cause No. 7126.

The Wood Preserving Corporation,
Plaintiff-appellant,

vs.

Department of Treasury of the State of Indiana, *et al.*,
Defendants-appellees,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 12th day of December A. D. 1940.

Kenneth J. Carrick,
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 3, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the procedings below which accompanied the petition shall be treated as though filed in response to such writ.

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FILE COPY

No. 654

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. CLIFFORD TOWNSEND, PETER F. HEIN, LAWRENCE F. SULLIVAN, AS AND CONSTITUTING THE BOARD OF DEPARTMENT OF TREASURY OF THE STATE OF INDIANA,

Petitioners,

v.

THE WOOD PRESERVING CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

SAMUEL D. JACKSON,
Attorney General of the State of Indiana.

JOSEPH W. HUTCHINSON,
Deputy Attorney General.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. ——

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. CLIFFORD TOWNSEND, PETER F. HEIN, LAWRENCE F. SULLIVAN AS AND CONSTITUTING THE BOARD OF DEPARTMENT OF TREASURY OF THE STATE OF INDIANA,

Petitioners,

v.

THE WOOD PRESERVING CORPORATION.

Respondent.

PETITION FOR WRIT OF CERTIORARI

May It Please the Court:

The petition of Department of Treasury of the State of Indiana, M. Clifford Townsend, Peter F. Hein, Lawrence F. Sullivan, as and constituting the Board of Department of Treasury of the State of Indiana, respectfully shows to this Honorable Court:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED

This action, originally instituted in the District Court of the United States for the Southern District of Indiana, Indianapolis Division, and thereafter appealed to the United States Circuit Court of Appeals for the Seventh Circuit, the same being Cause No. 7126 in said Circuit Court of Appeals, was an action to recover taxes collected by the petitioners under the Indiana Gross Income Tax Act of 1933 (Chap. 50, Ind. Acts 1933, Burns Indiana Statutes Annotated, 1933, Sec. 64-2601, et seq. Baldwin's Indiana Statutes, 1934 Ed. 15981 et seq.)

The petitioners herein were successful in the District Court. An appeal was taken by The Wood Preserving Corporation resulting in a reversal of the decision of the District Court. This application for a Writ of Certiorari is for the purpose of having this Honorable Court review the decision of the Circuit Court of Appeals.

THE CONTESTED ISSUES ARE AS FOLLOWS:

1. Whether the taxes herein sought to be recovered are valid within the purview of the due process clause of the Fourteenth Amendment to the Federal Constitution. The petitioners contend that the taxable event as respects respondent, a non-resident of the State of Indiana, is the fact that said respondent is engaged in business within the State of Indiana, and derives gross income from sources within the State of Indiana.

2. Whether the taxes herein sought to be recovered are valid within the purview of the due process clause of

the Fourteenth Amendment to the Federal Constitution. The petitioners contend that the gross receipts which were the measure of the tax assessed and collected were derived from a source entirely within the State of Indiana, and that there was no evidence adduced before the United States District Court, and no finding of fact, which shows that the gross receipts derived from the sale of raw ties in Indiana were either in whole or in part derived from a source outside the State of Indiana.

3. Whether the taxes herein sought to be recovered were improperly assessed and collected in violation of the commerce clause, Article I, Section 8, of the Federal Constitution. The respondent's claim is that such taxes are laid upon receipts derived from interstate commerce, that they constitute a direct burden on such commerce, and are of a type which subjects the commerce to the risk of multiple taxation of like kind in other states. The petitioners, on the other hand, contend that the receipts forming the measure of the tax are not derived from interstate commerce, that the tax does not constitute a direct burden on interstate commerce, and that such tax is not of a type which subjects the commerce to the risk of multiple taxation of like kind in other states on the sole ground that interstate commerce is being done.

THE FACTS

The facts in the case were largely stipulated, and the District Court adopted them with some rather minor additions, as his findings of fact. They may be summarized as follows:

a. Respondent, The Wood Preserving Corporation, is organized under the laws of the State of Delaware, and is

engaged in the business of producing, purchasing and selling ties and timber. Its principal place of business is at Pittsburgh in the State of Pennsylvania. However, it maintains an office at Marietta, Ohio, at which offers to purchase untreated cross-ties were received via telephone from the purchasing agent of the Railroad Company at Baltimore, Maryland (F. 8(d), R. 38, ll. 26-34). It is qualified to do business in Indiana (F. 1, R. 20, ll. 35-45), but maintains no office there other than an office in the City of Indianapolis for the service of process and, in addition thereto, normally had one agent or employee assigned to the Indiana territory who was engaged in the buying of ties and was responsible to the respondent's Marietta office. In addition, respondent's District Manager of Production and Operation, with his headquarters at respondent's Marietta, Ohio, office made periodical trips to Indiana to interview people with whom respondent did business, in relation to complaints, giving them assistance, and to handle other matters that were beyond the authority of the field man's normal scope (F. 11, R. 48, ll. 28-41).

b. The Railroad Company, by telephone calls from its purchasing agent at Baltimore, Maryland, advised a representative of the respondent at its office at Marietta, Ohio, of the ties to be required by the Railroad and the price which it was willing to pay f. o. b. cars at loading point (F. 8(d), R. 38, ll. 26-32).

c. Subsequent to the receipt of the telephone order from the purchasing agent of the Railroad, the respondent prepared and mailed to known producers of cross-ties in the State of Indiana and elsewhere, a price list stating the size, quality, and kind of ties which respondent would accept at loading points along the right-of-way of the Baltimore & Ohio Railroad, and the prices which it would

pay for such ties (F. 8(d), R. 38, ll. 35-41). The circular so prepared by the respondent contained the following provisions:

> "The above prices are on the ground and we pay additional for loading to cars.
>
> "Our inspectors make immediate payment by sight draft at time of inspection."
>
> R. 39.

> "When ties are piled at loading points on the B. & O. Railroad according to the above and our specifications, each pile should be marked with a tag on which is written 'For The Wood Preserving Corporation' and the owner's name and address."
>
> R. 39.

> "Each stack shall have fastened to it a tag on which is written, 'for The Wood Preserving Corp.' the owner's name and address, the date when stacked, and the number of ties of each kind of wood in the stack."
>
> R. 43.

d. Producers having available supplies of ties and being willing to furnish the ties at the prices stated in respondent's price list, would notify by mail, wire, or phone, the Marietta office of the respondent, or respondent's agent would make such arrangements with producers in Indiana (F. 8(d), R. 44, ll. 17-24).

e. When the ties were ready at a loading point, an inspector of the respondent and an inspector of the Baltimore & Ohio Railroad Company would go to the loading point, and all ties accepted by the Railroad's inspector were loaded by the producer on cars of the Railroad. Ties rejected by the Railroad inspector were not loaded on cars or paid for by the respondent (F. 8(d), R. 44, ll. 30-36).

f. A shipping report was made out by the respondent's agent, and one copy sent to the respondent's Marietta office and one to the National Lumber and Creosoting Company at Finney, Ohio (F. 8(d), R. 44, ll. 37-40). Also at the end of each day the Railroad inspector prepared an inspection report of the ties accepted, and furnished a copy of the report, in duplicate, to respondent's inspector. Upon the basis of this inspection report, respondent's inspector, by drafts on banks outside of the State of Indiana, settled with the producer for the ties accepted at the points of loading within Indiana. The amount of the drafts was predicated upon the price-lists, plus the loading charges above referred to, if any (F. 8(d), R. 45, ll. 13-21).

g. All of the ties originating in Indiana were delivered to the Railroad Company f. o. b. cars at points of origin within Indiana (F. 9, R. 48, ll. 1-4).

h. The respondent's agent, while within the State of Indiana, forwarded the following:

1. One copy of the shipping report prepared by respondent's agent to the respondent's Marietta office (F. 8(d), R. 44, l. 37, to R. 45, l. 12).

2. One copy of shipping report of respondent's agent to National Lumber and Creosoting Company at Finney, Ohio (F. 8(d), R. 44, ll. 36-40).

3. One copy of shipping report of respondent's agent to the Baltimore, Maryland, office of the Railroad Company (F. 8(d), R. 45, ll. 25-29).

4. One copy of the respondent's draft used in paying the producer, to the respondent's Marietta, Ohio, office (F. 8(d), R. 45, ll. 21-25).

5. One copy of the railroad inspector's report to respondent's Marietta office (F. 8(d), R. 45, ll. 21-25).

6. One copy of the billing of cars to the Baltimore, Maryland, office of the Railroad Company (F. 8(d), R. 45, ll. 25-29).

i. At the end of each day's loading of ties along the right-of-way of the Railroad in Indiana, the ties were billed by the respondent's agent in the name of The Wood Preserving Corporation, to the Baltimore & Ohio Railroad company in care of the person who was at the time chief engineer of maintenance of the Railroad Company stationed at Finney, Ohio (F. 11, R. 48, l. 42, to R. 49, l. 2). The respondent paid no freight to the Railroad Company for transporting to Finney the ties so loaded in Indiana and billed to the Railroad Company as above stated (F. 11, R. 49, ll. 5-8).

j. At the end of each week the respondent's Marietta office prepared an invoice against the Railroad Company for ties inspected, reported, sold, and delivered to the Railroad Company during the previous week, as shown by the inspection reports, and forwarded this invoice to the Baltimore, Maryland, office of the Railroad Company (F. 8(d), R. 45, ll. 29-37).

k. Payments to the respondent for the untreated ties so furnished were made in the regular course of business by the Baltimore & Ohio Railroad by checks drawn on banks located in cities outside of the State of Indiana, mailed to the respondent's Pittsburgh, Pennsylvania, office, and deposited there (F. 8(d), R. 47, ll. 5-10).

l. All of the ties originating in Indiana during the years of 1934, 1935, and 1936, which were sold to the

Railroad Company by the respondent were delivered to the Railroad Company f. o. b. cars at points of origin within Indiana, and were carried by the Railroad Company from the points of origin in Indiana to the National Lumber & Creosoting plant at Finney, Ohio (F. 9, R. 48, ll. 1-11). These ties were transported to the Finney, Ohio, treating plant for the purpose of having the same treated and no freight charges were paid to the Railroad Company for transportation of said ties from points of origin in Indiana to the Finney plant (R. 49).

B.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

1. In ruling that the "taxable event" under the Indiana Gross Income Tax Act was the actual physical receipt of the income, instead of the engaging in business and deriving gross income from a source within Indiana (the taxable event specified by the statute itself), the Circuit Court of Appeals decided an important question of local law in a way probably in conflict with applicable local decisions.

See: C. C. A., Opinion, R. 73 to 76; and Applicable Statute, R. 74; also Brief in support of this petition, p. 22-30, infra.

2. In ruling that the "taxable event" as construed by the Circuit Court of Appeals was beyond the taxing jurisdiction of the State of Indiana for the reason that the actual physical receipt of the income by the respondent was in Pennsylvania, and that such tax was unconstitutional and void as being a denial of due process as provided by the Fourteenth Amendment to the Federal Con-

stitution, the Circuit Court decided a federal question in a way probably in conflict with applicable decisions of this Court.

See: C. C. A., Opinion R. 73 to 76; and applicable statute, R. 74; also Brief in support of this petition, p. 22-30, infra.

3. In holding that the tax as applied to the respondent is unconstitutional as impinging the due process clause of the Fourteenth Amendment notwithstanding, as we believe, that the measure of the tax was entirely derived from an Indiana source, the Circuit Court of Appeals has decided a question of federal law in a way probably in conflict with applicable decisions of this court.

See: C. C. A., Opinion, R. 76-77; also Brief in support of this petition, p. 22-30, infra.

4. In holding, upon the evidence already summarized, that "a sizable portion of the business affording the source of income, was transacted outside the State of Indiana both before and subsequent to the actual delivery of the ties to the Railroad," thereby concluding that the state had no jurisdiction to tax in the absence of an apportionment, the Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals; to wit, the decision of the Circuit Court of Appeals for the Fourth Circuit in the case of *Dravo Contracting Company v. James,* reported in 114 Fed. Reporter (2d) at p. 242.

5. In holding that "the tax as laid is invalid because no method is provided by the Act or otherwise for allocating the tax to income derived from that part of the business transacted in Indiana," the Circuit Court of Appeals has decided an important question of general law in a way

1 Wisconsin v. J. C. Penny Co., No. 46 decided by United States Supreme Court, Dec. 16, 1940.

probably untenable, and in conflict with the weight of authority.

See: C. C. A., Opinion, R. 77; also Brief in support of this petition, p. 32-40, infra.

6. In ruling that in a suit seeking a refund of taxes the burden is not upon the taxpayer-plaintiff to make and prove an apportionment but upon the defendants, the Circuit Court of Appeals has decided an important question of general law in a way probably untenable, and in conflict with the weight of authority.

See: C. C. A., Opinion, R. 77; also Brief in support of this petition, p. 32-40, infra.

7. In holding that the burden of proof relating to an allocation of gross receipts as bearing upon due process is not upon the plaintiff seeking a refund of taxes but is upon the defendants, the Circuit Court of Appeals has decided a question of federal law in a way probably in conflict with applicable decisions of this court.

See: C. C. A., Opinion, R. 76-77; also Brief in support of this petition, p. 32-40, infra.

8. In assuming, in the absence of supporting evidence or findings in the Record, that so-called outside transactions contributed "materially" to the source of income within Indiana, the Circuit Court of Appeals decided an important question of general law in a way probably untenable and in conflict with the weight of authority.

See: C. C. A., Opinion, R. 77; also Brief in support of this petition, p. 32-40, infra.

9. In ruling that outside transactions contributed "materially" to respondent's source of income within Indiana

despite respondent Wood Preserving Corporation's failure to tender evidence to establish that fact, the Circuit Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

See: C. C. A., Opinion, R. 77; Findings, R. 20 to 49; also Brief in support of this petition, p. 32-40, infra.

10. In holding that a sale culminated by the seller's delivery of the article sold to the buyer within the state of origin, is so affected by the purchaser's subsequent transportation of the article to another state for treatment by a third party preliminary to the buyer's ultimate use thereof as to characterize the original sale and delivery as being one in interstate commerce, the Circuit Court of Appeals has decided a federal question in a way probably in conflict with applicable decisions of this Court.

See: C. C. A., Opinion, R. 80-81; also Brief in support of this petition, p. 40-51, infra.

11. In ruling that the gross income derived by a seller from a sale completed by delivery of the article sold within the state of its origin cannot be ultilized as a measure of an excise tax upon such business activity of the seller because of the buyer's subsequent transportation of its purchase to another state under the conditions set out in "10" supra, and that "the tax in question discriminates" unconstitutionally "against interstate commerce," the Circuit Court of Appeals has decided a federal question in a way probably in conflict with applicable decisions of this court.

See: C. C. A., Opinion, R. 80 to 82; also Brief in support of this petition, p. 40-51, infra.

C.

JURISDICTION

The statutory provision believed to sustain the jurisdiction of this Court is Section 240 of the Judicial Code as amended by the Act of February 13, 1925, 43 Stats. 938, 28 U. S. C. A. Section 347.

D.

OPINIONS BELOW

The judgment of the District Court is set forth in the Record at page 59. The opinion of the Circuit Court of Appeals is reported in 114 Fed. (2d) 922, and is also set forth in the Record at pages 70 to 83.

The judgment of the Circuit Court of Appeals reversing the District Court was entered on July 20, 1940 (R. 83); and the petition for a rehearing was denied by the Circuit Court of Appeals on October 5, 1940 (R. 84).

Your petitioners append hereto their brief in support of this petition, in which each of the foregoing matters is more fully set forth and discussed.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued as of and under the seal of this honorable Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the Record and

all proceedings in the case numbered and entitled on its docket, "No. 7126, The Wood Preserving Corporation, Plaintiff-Appellant, v. Department of Treasury of the State of Indiana, et al., Defendants-Appellees," and that the said judgment of the United States Circuit Court of Appeals for the Seventh Circuit may be reversed by this honorable Court, and that your petitioners may have such other and further relief in the premises as to this honorable Court may seem meet and just; and your petitioners will ever pray.

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. CLIFFORD TOWNSEND, PETER F. HEIN, LAWRENCE F. SULLIVAN, AS AND CONSTITUTING THE BOARD OF DEPARTMENT OF TREASURY OF THE STATE OF INDIANA,

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Deputy Attorney General,
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. ——

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. CLIFFORD TOWNSEND, PETER F. HEIN, LAWRENCE F. SULLIVAN AS AND CONSTITUTING THE BOARD OF DEPARTMENT OF TREASURY OF THE STATE OF INDIANA,

Petitioners,

v.

THE WOOD PRESERVING CORPORATION.

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The Opinion of the Court Below

The opinion of the Circuit Court of Appeals in *Wood Preserving Corporation v. Department of Treasury of Indiana* was rendered on July 20, 1940, and is reported at

114 Fed. (2d) 922; it is also reproduced in the Record at pages 70 to 83. The petition for rehearing was overruled on October 5, 1940, as appears in the Record at page 84.

II

Jurisdiction

The statutory provision believed to sustain the jurisdiction of this Court is Section 240 of the Judicial Code as amended by the Act of February 13, 1925, 43 Stats. 938, 28 U. S. C. A. Section 347.

III

Statement of the Case

The Court is respectfully referred to the statement of the case under the heading "A" in the foregoing petition for writ of certiorari (supra, pp. 2 to 8).

IV

Specification of Errors

The Court is respectfully referred to the "Reasons relied upon for the allowance of the writ," which are the errors relied upon, under the heading "B" in the foregoing petition for writ of certiorari (supra, pp. 8 to 11).

V

Summary of the Argument

One

The Act itself designates, in section 2 thereof, the taxable event, which in the case of the respondent, a non-

resident of the State of Indiana, is engaging in business in the state or deriving gross income from sources within Indiana.* The respondent, a non-resident of Indiana, engaged in the business of purchasing, selling, and delivering untreated cross-ties within the State of Indiana. The taxable event on which the taxes were levied was wholly within the State of Indiana, and did not impinge upon the due process clause of the Fourteenth Amendment to the Constitution of the United States.**

*Sec. 2, Chapter 50, Indiana Acts 1933, p. 388 at p. 390;

See: *Storen, etc., et al. v. J. D. Adams Mfg. Co.*, (1937), 212 Ind. 343, 7 N. E. (2d) 941 at 946; *J. D. Adams Mfg. Co. v. Storen* (1938), 304 U. S. 307 at 308, and at 310;

Also: *Miles, et al v. Department of Treasury* (1935), 209 Ind. 172 at 178, 199 N. E. 372 at 378-379;

Indiana Creosoting Co. v. McNutt, (1936), 210 Ind. 656, at 663, 664, 5 N. E. (2d) 310 at 313;

**_Equitable Life Society v. Pennsylvania_, (1915), 238 U. S. 143, 35 Sup. Ct. 829, 59 L. Ed. 1239;

Shriver v. Pittsburgh, (1876) 66 Pa. 446;

F. 1, R. 20, ll. 33-34; F. 8(d), R. 44, ll. 22-24; F. 9, R. 48, ll. 1-4; F. 11, R. 49, ll. 32-36.

Two

In holding, upon the evidence already summarized, that "a sizable portion of the business affording the source of income, was transacted outside of the State of Indiana

both before and subsequent to the actual delivery of the ties to the Railroad," thereby concluding that the state had no jurisdiction to tax in the absence of an apportionment, the Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals, to-wit: the decision of the Circuit Court of Appeals for the Fourth Circuit in the case of *Dravo Contracting Company v. James*, reported in 114 Fed. (2d) at p. 242. It would appear from the opinion of the Circuit Court of Appeals for the Seventh Circuit that the "sizable portion of the business affording the source of income" to which the opinion refers is the bookkeeping, invoicing, and general office activities of the respondent which were carried on outside of the state; however, it seems apparent that these were not income-producing activities and that they are not, in the true sense, the source of the respondent's income used as a measure of this tax.

Three

The total receipt which was the measure of the tax was derived from business engaged in and from a source within Indiana. For all of the gross income used as the measure of the tax represented the purchase price of the raw, untreated cross-ties which respondent acquired, sold, and delivered in Indiana. The purchaser did not purchase or pay for anything other than the raw, untreated cross-ties delivered to it in Indiana, and more particularly did not pay for any manufacture or fabrication in another state, nor purchase additional performance by respondent of any part of the sales contract in another state. There can be no question but that the source of the respondent's gross income used as the measure of this tax was: (a) the

procuring within Indiana of the raw cross-ties from the producers thereof (R. 44); (b) the acceptance of the Railroad's offer to purchase ties which was the respondent's action taken within Indiana giving rise to the contract of sale resulting in the receipts in question (see option: F. 8(a), R. 25; offer to purchase: F. 8(d). R. 38, ll. 26-41; acceptance by acquisition of ties: F. 8(d), R. 44, ll. 30-36); and (c) respondent's unconditional delivery within Indiana of the ties to the purchaser (R. 44, 48). No part of the measure was contractual compensation for any additional acts performed by the respondent in any other state as a part of the sales contract. There was nothing, therefore, to apportion.

Pittsburgh Life and Trust Co. v. Young, (1916) 172 N. C. 470, 90 S. E. 568 at 573.

This action seeks a refund. The primary burden of proof with reference to apportionment, if any is justified, is upon the respondent by virtue of its instituting the action as the plaintiff. In addition, the taxing act itself places the primary burden of making the assessment upon the taxpayer, who consequently has the affirmative burden of claiming an apportionment if one is believed due or necessary, and the burden of making the proper apportionment so that the measure of the tax will embrace only receipts from a source or business activities within Indiana. One attacking the constitutionality of a tax upon the thesis that income is properly ascribed to income-producing activities carried on in other states should establish by virtue of its role in the litigation the amount of income which it claims is properly within the taxing jurisdiction of the second state. Then too, it is the plaintiff, not the defendant, in a refund case who has the peculiar knowledge necessary

to establish the apportionment, so that the plaintiff correctly bears the burden of proof.

Significant it is that the respondent did not introduce evidence proving what part, if any, of the purchase price of the raw cross-ties was derived from sources outside of Indiana.

Underwood Typewriter Co. v. Chamberlain, (1920) 254 U. S. 113 at 120, 121;

Bass, Ratcliff and Gretton, Ltd. v. State Tax Commission, (1924) 266 U. S. 271 at 280-283.

Section 2 of the taxing Act automatically provides that an apportionment or allocation of income be made, as it includes within the measure of the tax as applied to non-residents such as the respondent only that portion of the receipts attributable to business transacted within the state or sources there.

Sec. 2, Chapter 50, Indiana Acts 1933, p. 388 at p. 390:: 11 Burns Indiana Statutes Annotated, 1933 Ed., 64-2602:: Baldwin's Indiana Statutes, 1934 Ed., 15,982.

Four

The gross receipts which are used as the measure of the tax are derived solely from intrastate transactions, from which it follows that the Commerce Clause of the United States Constitution is not violated.

A. Goods bought in one state for transportation to another state in cases where title passes in the latter state constitutes interstate commerce in its simplest conception. Upon the same principle it is held that where there was a

regular course of business contemplated by the parties which took the goods sold into another state as an essential part of the transaction, and where by mutual agreement such goods are put into the hands of a third person, a common carrier, for transportation to the latter state,—that in such case interstate commerce is involved. But, where the buyer accepts delivery and title upon its own property in the seller's state and the subsequent transportation is made via the buyer's transportation facilities, the transaction is intrastate notwithstanding the seller may at the time have known of the course of business whereby the buyer was to make further transportation of such goods.

Superior Oil Company v. Mississippi, 280 U. S. 390, at pp. 394-395.

B. The transaction between the respondent and the railroad company resulting in the gross receipts (purchase price of cross-ties) was wholly intrastate. The transportation to Finney, Ohio, relied upon as establishing the claim of interstate commerce, was made by the railroad company over its own lines without the payment of freight or other charge after having first accepted title and delivery upon its own right-of-way, in Indiana, and for the sole purpose of having the cross-ties treated by the National Lumber and Creosoting Company. The transportation in such a case and for such a purpose is not interstate commerce.

Eastern Air Transport Company, Inc. v. South Carolina Tax Commission, et al., 285 U. S. 147, at pp. 152-153;

Superior Oil Company v. Mississippi, 280 U. S. 390, at pp. 394-395.

C. The transportation by the railroad company of its own product via its own lines does not constitute inter-

state commerce; and it makes no difference how title was acquired so long as it was acquired by virtue of a simple intrastate transaction.

The Pipe Line Cases, 234 U. S. 548, at pp. 561-562.

D. That the property transported is for the ultimate use of the buyer who is also the carrier is to be considered with other facts in determining whether interstate commerce is involved.

Eastern Air Transport Company, Inc. v. South Carolina Tax Commission, et al., 285 U. S. 147, at pp. 152-153.

E. The intention and contemplation of the parties is wholly immaterial where the transaction is clearly intrastate. In other words, a transaction which is clearly intrastate is not converted into an interstate transaction by the intention of the parties to that effect.

Superior Oil Company v. Mississippi, 280 U. S. 390, at p. 395.

F. The "multiple taxation doctrine" has nothing to do with the *determination* of the question whether interstate commerce is or is not involved. On the contrary, it has to do with the question as to whether a given tax is a *burden* when interstate commerce has been otherwise made to appear. There is no legal objection to double taxation in different jurisdictions; in fact, double taxation in a legal sense does not exist unless the double tax is levied upon the same property within the same jurisdiction.

Ohio Tax Cases, 232 U. S. 576, at p. 593;
Wright v. Louisville and Nashville R. R. Co., 195 U. S. 219, at p. 222;
Kidd v. Alabama, 188 U. S. 730, at p. 732.

VI

ARGUMENT

Preliminary

The petitioners in this brief in support of their petition for a writ of certiorari will present the questions raised in the order in which they appear in the petition.

One

The Taxable Event

(A discussion of No. 1 of the contested issues—see page 2 of Petition, and in support of grounds 1, 2, and 3 of reasons for the writ—pages 8-9 of the Petition.)

The majority opinion of the Circuit Court of Appeals in stating the contentions of the parties as to what constitutes the taxable event used the following language:

> "It is contended by the plaintiff that the event was the receipt of gross income which occurred in Pennsylvania. If this position is sound, it is evident —in fact, not disputed—that the State of Indiana was without power to levy and collect the tax. It is defendants' contention as stated in their brief, that 'the thing which the Statute authorizes as the taxable event, the thing which was taxed, is the transaction which occurs within Indiana involved in one of two things, either doing business within the state or deriving income from a source within the State.' Under this theory, the gross income received in Pennsylvania is merely the measure for the tax."

We agree with this statement respecting the contentions of the parties, and we agree also with the statement immediately following to the effect that "under this theory," (referring to petitioners' theory,) "the gross income received in Pennsylvania is merely the measure for the tax." Indeed, the statute very clearly states that the gross receipts in any event, are not themselves taxed but constitute the measure for the tax. Note the language of Section 2 of the Act wherein it is provided:

> "There is hereby imposed a tax, measured by the amount, or volume, of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided."...

If we can admit that a statute which is so clear upon the present issue requires construction in the technical sense, we perhaps can conceive the next statement of the majority opinion to the effect that "the respective contentions require a construction of the Statute relied upon as a measure for the tax" but we are wholly unable to bring ourselves in agreement either with the result reached by the majority opinion or the reasoning through which that result was reached.

Significant and important it is *that the Act itself designates,* in section 2, *the taxable event,* which in the case of the respondent, a non-resident (F. 1, R. 20, ll. 24-28), is the engaging in business in the state or deriving gross income from sources within Indiana. The exact language utilized by the Indiana General Assembly in so specifying the taxable event is:

> "There is hereby imposed a tax, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. *Such tax*

> *shall be levied* upon the entire gross income of all residents of the State of Indiana, and *upon the gross income derived from sources within the State of Indiana, of all persons and/or companies, including banks, who are not residents of the State of Indiana, but are engaged in business in this state, or who derive gross income from sources within this state,* and shall be in addition to all other taxes now or hereafter imposed with respect to particular occupations and/or activities. Said tax shall apply to, and shall be levied and collected upon, all gross incomes received on or after the first day of May, 1933, with such exceptions and limitations as may be hereinafter provided."
>
> Sec. 2, Chapter 50, Indiana Acts 1933, p 388 at p. 390.

It is apparent that the language particularly applicable to the respondent, a non-resident (F. 1, R. 20, ll. 24-28), is the italicized language which, telescoped, is as follows:

> "Such tax shall be levied upon the gross income derived from sources within the State of Indiana, of all persons and/or companies, including banks, who are not residents of the State of Indiana but are engaged in business in this state, or who derive gross income from sources within this state."

The statutory language is plain, is clear, and is unambiguous. It requires no legal construction or interpretation. It establishes the fact that insofar as the Act applies to non-residents (of which the respondent is one), the taxable event is deriving gross income from business transacted in Indiana or from sources within the State of Indiana, irrespective of where the actual physical receipt took place.

Just what constitutes the taxable events under the Act has been commented upon by the Indiana Supreme Court in three of its decisions, and by the United States Supreme Court in one of its decisions, and, as we shall show in every decision involving this particular Act, the Courts have been very careful to point out that there are two taxable events, i.e., one for residents, and a separate and distinct taxable event insofar as non-residents are concerned.

Every decision which has commented upon the taxable events under this particular statute has recognized as valid the foregoing claims with respect to what constitutes the taxable event, even including—we insist—the case of *Adams Manufacturing Company v. Storen*, 304 U. S. 307, so much relied upon in the majority opinion of the Circuit Court of Appeals in this case. Before touching upon the Adams case, however, we desire to refer to the decisions of the Court of last resort in the State of Indiana on that subject.

We respectfully direct the attention of the Court first to the opinion of the Indiana Supreme Court in *Miles, et al. v. Department of Treasury* (1935), 209 Ind. 172 at 188, 199 N. E. 372 at 378-379, 101 A. L. R. 1359, which (in part) reads as follows:

> "*We conclude that the tax in question is an excise, levied upon those* domiciled within the state *or who derive income from sources within the state, upon* the basis of the privilege *of domicile or the privilege of transacting business within the state,* and that the burden may reasonably be measured by the amount of income. The reasoning which justifies a tax upon the basis of domicile as readily supports and justifies a tax upon the basis of the right to receive income within, or transact business under the protection of, the state. We feel that the weight of reason and authority sustains this view."

The Supreme Court of Indiana repeated this interpretation of the identical Act here under consideration in its opinion in *Indiana Creosoting Co. v. McNutt* (1936), 210 Ind. 656, 663, 664; 5 N. E. (2d) 310 at 313, where it said:

> "• • • The gross income tax is an excise tax, and is measured by the receipt of gross income. In the case of *Miles v. Department of Treasury* (1935) 209 Ind. 172, 199 N. E. 372, 379, 101 A. L. R. 1359, the court, in considering the Gross Income Tax Act, said (page 188): 'We conclude that the tax in question is an excise, *levied upon* those domiciled within the state or *who derive income from sources within the state, upon* the basis of the privilege of domicile or the *privilege of transacting business within the state,* and that the burden may reasonably be measured by the amount of income. The reasoning which justifies a tax upon the basis of domicile as readily supports and justifies a tax upon the basis of the right to receive income within, *or transact business under the protection of, the state.*'"

Parenthetically, it should be noted that while this case differs from the *Indiana Creosoting Company* appeal in that the plaintiff there was a resident of Indiana (5 N. E. (2d) at 311), while the present respondent is a non-resident (F. 1, R. 20, ll. 24-28), the two cases have points of similarity in that:

(a) in the *Indiana Creosoting* case

> "the book accounts were kept in Louisville; that the money received in payment of accounts was sent to the office in Louisville" (*i. e.*: from the Chicago office of the Chicago, Indianapolis and Louisville Railway Company), "and the bills for supplies and material were paid at the same place" (5 N. E. (2d) at 312),

while in this appeal the respondent receives the gross in-

come from its Indiana business in Pittsburgh and deposits it there; and

(b) the Indiana Creosoting Company claimed to be engaged in interstate commerce although (as is the situation of the respondent) it was not obliged to ship the ties to points outside of Indiana but delivered the ties to the railway company at Bloomington, Indiana (5 N. E. (2d) at 312), while in this appeal this respondent is not obliged to make delivery of the ties across state lines to the purchaser at points outside of Indiana, but actually made delivery at points of origin within Indiana (F. 9, R. 48, ll. 1-4).

Practically the same language, quoted herein from the *Miles* (209 Ind. 172 at 188), and the *Indiana Creosoting Company* (210 Ind. 656), cases, was repeated by the Indiana Supreme Court in *Storen etc. et al. v. J. D. Adams Mfg. Co.* (1937), 212 Ind. 343, 7 N. E. (2d) 941 at 946. And as we shall hereafter show, the United States Supreme Court indicated that it recognized the Act's language defining the taxable event insofar as non-residents were concerned when it said:

> "* * * Section 2 imposes a tax ascertained by the application of specified rates to the gross income of every resident of the State *and the gross income of every nonresident derived from sources within the state.* * * *"*
>
> *J. D. Adams Mfg. Co. v. Storen* (1938), 304 U. S. 307 at 308.

> "The tax is not an excise for the privilege of domicile alone, since *it is levied upon the gross income of non-residents from sources within the State.*"
>
> *J. D. Adams Mfg. Co. v. Storen* (1938), 304 U. S. 307 at 310.

The repeated determination of the Indiana Supreme Court with reference to the existence of two taxable events; i.e., one for residents and another for non-residents, was confirmed by the opinion of the United States Supreme Court in the case of *J. D. Adams Mfg. Company v. Storen* (1938), 304 U. S. 307. At the outset we find from the statement of facts (304 U. S. at 308) that the appeal there considered differed materially from the situation here presented, since the J. D. Adams Mfg. Company was an Indiana corporation, while contrarywise The Wood Preserving Corporation is a non-resident of Indiana. (F. 1, R. 20, ll. 24-28).

But the United States Supreme Court in determining the *Adams* appeal indicated that it was aware of the Act's language with reference to the taxable event insofar as non-residents were concerned when it pointed out:

> "* * * Section 2 imposes a tax ascertained by the application of specified rates to the gross income of every resident of the state and the gross income of *every non-resident derived from sources within the State.* * * *"
>
> *J. D. Adams Mfg. Co. v. Storen* (1938), 304 U. S. 307 at 308.

> "The tax is not an excise for the privilege of domicile alone, since it is levied upon the gross income of *non-residents from sources within the State.*"
>
> *J. D. Adams Mfg. Co. v. Storen* (1938), 304 U. S. 307 at 310.

And the dissenting opinion concurred with the majority in this particular, utilizing the following language:

> "The Indiana statute of 1933 here invalidated imposes 'a tax, measured by the amount or volume

> of gross income, . . . upon all residents of the State of Indiana, and upon the gross income *derived from sources within the State of Indiana, of all persons and . . . companies . . . who are not residents of Indiana, but are engaged* in business in Indiana.' "
>
> *J. D. Adams Mfg. Co. v. Storen* (1938) 304 U. S. 307; diss: at 316.

Section 2 of the Act in specifying that as to non-residents the taxable event is deriving gross income from sources within Indiana or engaging in business within the state is clear, unambiguous, and does not require construction or interpretation. It means precisely what it says. The earlier parts of section 2 had provided a method for the taxation of residents of the State. It was recognized, however, that there were many non-residents, both corporate and individual, who were doing, or would do, business in the State who, so far as those transactions were concerned, should be taxed in the same manner and to the same extent that residents of the state were taxed. The purpose of the last above-quoted language from the Act was very apparently to reach that class of persons or corporations who, although non-residents, were either doing business within the state or deriving gross income from sources within the state, irrespective of where the physical receipt of the gross income occurred.

The majority opinion in this case to support its construction of the non-resident provision makes the following statement:

> "It appears to us that the non-resident provision of the Act upon which defendants rely, was intended to apply to persons not legal residents of the State, but living temporarily, or engaged in busi-

ness in the State *and receiving income there.*" (Our italics).

But this is no justification for the construction which the Court has made. If this is all that the non-resident provision means then there was absolutely no reason for the non-resident provision at all. That is, from the draftsman's standpoint, they might just as well have been treated together. In other words, if the sole test was to be the locale of the actual physical receipt of the income, then all references within the Act to residents and non-residents, to engaging in business, or to sources of the income, were manifestly superfluous.

From the foregoing it is apparent that the construction of the Act adopted by the majority opinion in the instant case, runs counter to the authoritative decisions of the Indiana Supreme Court in three cases and the United States Supreme Court in the Adams case which was relied upon by the respondent in the Circuit Court of Appeals.

Attention is also directed to the result of this new construction of the Act by the Circuit Court of Appeals. It permits one whose entire income is derived from business done in the State of Indiana and the depletion of natural resources of that State, to escape taxation by arranging to have the actual physical receipt of the income, generated wholly from Indiana sources, to take place outside of the State.

Two

The Decision Is in Conflict With the Decision of a Similar Question by Another Circuit Court of Appeals

(In support of ground 4 of reasons for the writ see page 9 of the petition.)

[2] Wisconsin v. J. C. Penny Co., No. 46 decided by United States Supreme Court, Dec. 16, 1940.

It is apparent that the decision of the Circuit Court of Appeals for the Seventh Circuit in this present case is in conflict with the decision of the Circuit Court of Appeals of the Fourth Circuit in the case of *Dravo Contracting Company v. James*, 114 Fed. (2d) 242, decided September 6, 1940. In this present case the Court holds that a sizable portion of the business affording the source of income was transacted outside the State of Indiana both before and subsequent to the actual delivery of the ties to the Railroad Company. The basis for this statement evidently is what had earlier been referred to in the opinion by the Court involving the question of bookkeeping, invoicing, and matters of similar character. We contend that such matters are not to be considered in determining the question as to the source of the gross income. An examination of the case of *Dravo Contracting Company v. James, supra*, reveals very clearly that the Court in that case was excluding services of a much more applicable character in determining the source of the gross income which was the measure of the West Virginia tax. The Court in the *Dravo* case makes it very clear that a state may tax what is carried on within its borders measured by income received, although it may depend upon transactions extending beyond the state's borders. As was stated by the Court on page 247, 114 Fed. (2d) 247,

> "'The power to tax income derived from contracting within the state is not affected by the fact that materials for use under the contract may be brought from without the state, or that they may have been prepared by the contractor without the state for use under the contract.'"

Much less should the items of bookkeeping, invoicing, and office transactions be held to affect the question of the source of the income of a sale completed in a state other

than the second state which was the situs of the bookkeeping and office transactions.

Three

No Apportionment Was Necessary

(A discussion of No. 2 of the contested issues—see page 2 of Petition, and in support of grounds 5, 6, 7, 8, and 9 of reasons for the writ—pages 9-10 of the Petition.)

A. The Act provides a perfect method of apportionment.

The majority opinion of the Court ignores the fact that, insofar as non-residents are concerned, the Act provides that the tax is to be measured exclusively by receipts from transacting business within the State. The language applicable to the respondent reads:

> "Such tax shall be levied * * * upon the gross income derived from sources within the State of Indiana, of all persons and/or companies, including banks, who are not residents of the State of Indiana, but are engaged in business in the state, or who derive gross income from sources within this state, * * *."

The foregoing language has been judicially interpreted to mean *that as to non-residents the tax is on the basis of the privilege of transacting business within the state.*

> *Miles et al. v. Department of Treasury* (1935), 209 Ind. 172 at 188, 199 N. E. 372 at 378-379, 101 A. L. R. 1359.

Thus construed, it is at once apparent that the portion of section 2 of the Act dealing with non-residents automatically provides for an allocation of income *since it taxes only that portion of the income attributable to business*

transacted within the state. The Act clearly indicates that non-residents are to pay *only* on that portion of their income which an apportionment indicates is allocatable to business transacted in Indiana. Incidentally, since the taxing act deals with *gross,* and not net income, it was unnecessary to resort to calculus or to an involved formula of allocation. In *gross* income taxation the limitation of the tax on non-residents to income attributed to business transacted within the state results in a perfect apportionment. The difference between net and gross income tax measures, insofar as allocation is concerned, is that in *net* income taxation the allocation computation necessarily starts off with a comprehensive aggregate of all receipts derived from every source and, therefore, includes amounts admittedly beyond the taxing jurisdiction of any single state. In gross income tax measures (such as the Indiana Act) usually the only amount utilized is limited to receipts derived from business transacted *in the state.*

A comparison with the Indiana statute of the revenue measure in the case of *Hans Rees' Sons v. North Carolina,* 283 U. S. 123, relied upon by the Court in the majority opinion, constitutes a perfect illustration of what we have just pointed out. Note the language of the North Carolina statute:

> "Every corporation organized under the laws of this State shall pay annually an income tax, equivalent to four per cent of the entire net income as herein defined, received by such corporation during the income year; and every foreign corporation doing business in this State shall pay annually an income tax equivalent to four per cent of a proportion of its entire income to be determined according to the following rules:"

Necessarily, a net income taxing act requires an apportionment formula because it uses aggregate amounts from the entire unitary business. In the Indiana Act the basis of taxation is defined accurately and limited to that which is derived from business within the state. No comprehensive aggregates of all receipts from all business in all of the states is utilized, or necessary,—hence no involved formula is required. This conclusion follows for two reasons:

I. The tax as applied to non-residents seeks to tax ONLY that portion of their income attributable to transacting business within Indiana,

> Sec. 2, Chap. 50, Indiana Acts 1933, p. 388 at p. 390;
> *Miles et al. v. Department of Treasury* (1935), 209 Ind. 172 at 188, 199 N. E. 372 at 378-379,

so that any receipts representing business activities outside of Indiana should be eliminated by statutory command.

II. Where words of general or broad import are used in a statute, the court will, by restrictive interpretation, construe them to apply only to cases clearly within the field of legislative control.

> *Japanese Immigrant Case,* 189 U. S. 86, 101, 23 S. Ct. 611;
>
> *U. S. v. Coombs,* 12 Pet. 72, 76, 9 L. ed. 1004;
> *Albany Co. v. Stanley,* 105 U. S. 305, 26 L. ed. 1044.

Similarly, when a statute is broad enough to cover matters without the state, as well as within, and as applied to matters without the state it would be unconstitutional, the court may restrict its application to matters within the jurisdiction of the state.

Singer Sewing Machine Co. v. Breckell, 233 U. S. 304, 34 S. Ct. 493;

State v. Peet, 80 Vt. 449, 68 Atl. 661, 130 A. S. R. 998;

State v. Clement National Bank, 84 Vt. 167, 78 Atl. 944.

B. The petitioners were not required to bear the primary burden of proof with reference to the apportionment of income achieved by the application of the Indiana Act.

It is respectfully submitted that the statement contained in the majority opinion:

> "Nor do we think, as argued, that the burden is upon the taxpayer to make an apportionment. It would seem more reasonable to think that it is incumbent upon the state which seeks to impose the tax, to provide a method of determining that portion of the income derived from transactions occurring within the state,"

misconceives the nature of Section 2 of the taxing act, which provides that only the income derived from Indiana business or sources is to be used as the measure of the tax, but, more than that, it misconceives the nature of this action. It is important, then, to note that prior to the institution of this action the taxpayer had been granted a hearing before an administrative board, as provided by the statute, and that this board had determined that the amount used as the measure herein was derived from business activities carried on within the State of Indiana. The respondent then paid the tax and instituted this action seeking a refund, claiming in part that the determinations of the assessing authorities were erroneous. But the respondent did not offer any evidence to show what, if any, amount used as a

measure of this tax was not properly allocated to Indiana business sources.

The majority opinion seems to indicate that the primary burden of proof is to be recognized as being upon the petitioners and not upon the respondent. We cannot agree with this. There would appear to be no reason why the usual rules with reference to the burden of proof in civil cases should be abrogated in a case seeking the refund of taxes paid.

Nor do we believe that the decision of the United States Supreme Court in *Hans Rees' Sons v. North Carolina,* 283 U. S. 123, cited in the majority opinion, sustains such a view. Contrarywise, the language of the Court appears to recognize that in the cases of *Underwood Typewriter Co. v. Chamberlain,* 254 U. S. 113, and *Bass, Ratcliff and Gretton, Ltd. v. State Tax Commission,* 266 U. S. 271, the taxpayers failed in their attempts to invalidate the apportionment methods used for the reason that they did not offer proof that the application of the statutory method of apportionment had produced an unreasonable result. The Court then proceeds to point out that the *Hans Rees' Sons* case differs from the *Underwood* and *Bass* cases because the evidence which was lacking in the latter cases was present in the *Hans Rees' Sons* case, as witness the language of the Court at pp. 132 and 133:

> "We are unable to agree with this view. *Evidence which was found to be lacking in the Underwood and Bass cases is present here.* These decisions are not authority for the conclusion that where a corporation manufactures in one State and sells in another, the net profits of the entire transaction, as a unitary enterprise, may be attributed, regardless of evidence, to either State. In the *Underwood*

> case, it was not decided that the entire net profits of the total business were to be allocated to Connecticut because that was the place of manufacture, or, in the *Bass* case, that the entire net profits were to be allocated to New York because that was the place where sales were made. In both instances, a method of apportionment was involved which, as was said in the *Underwood* case, '*for all that appears in the record*, reached, and was meant to reach, only the profits earned within the State.' The difficulty with the evidence offered in the *Underwood* case was that it failed to establish that the amount of net income with which the corporation was charged in Connecticut under the method adopted was not reasonably attributable to the processes conducted within the borders of that State; and in the *Bass* case the Court found a similar defect in proof with respect to the transactions in New York." (Our italics.)

It is both significant and important that the respondent did not introduce evidence proving (or even attempting to prove) what part, if any, of the purchase price of the raw cross-ties was derived from sources outside of the State of Indiana. Yet it is essential that one attacking the constitutionality of a taxing act upon the thesis that it taxes income properly ascribed to income-producing activities carried on in other states, affirmatively establish the amount of income which is properly taxable in the sister state.

Underwood Typewriter Co. v. Chamberlain (1920), 254 U. S. 113 at 120, 121;

Bass, Ratcliff and Gretton, Ltd. v. State Tax Commission (1924) 266 U .S. 271 at 280-283.

There is not a scintilla of evidence in this Record establishing the proportion of respondent's income attributable to any state other than Indiana. The respondent (plaintiff below) did not even attempt to produce any evi-

dence establishing what the apportionment it demands, if any, should be. Since the burden of proof was definitely upon the respondent to establish the amount or the proportion of its income attributable to Indiana and to each of the other states, the present state of the Record means 100% of the respondent's gross income here involved is attributable to its Indiana business.

Before leaving this branch of the discussion, we desire to call attention to one or two omissions appearing in the statement of the evidence in the majority opinion which may have some bearing upon the due process phase of the case. In the opinion, (R. 71) in referring to the respondent it is stated that the respondent "maintained no office in Indiana, but was qualified to do business in that state where it had a statutory agent for service of process"; but the opinion omitted to state, as appears from page 48 of the Record, that:

> "In addition to the agent maintained by plaintiff in the City of Indianapolis, Indiana, for the service of process, plaintiff during the years 1934, 1935 and 1936 normally had one agent or employee assigned to the Indiana territory who was engaged in the buying of ties and was responsible to the Marietta, Ohio, office."

Likewise there is omitted the further statement appearing on page 48 of the Record that:

> "Plaintiff's district manager of production and operation, with headquarters at plaintiff's Marietta, Ohio, office, made periodical trips to Indiana during said years to interview people with whom plaintiff did business in relation to complaints, giving them assistance, and other matters that were beyond the authority of the normal field man's scope."
>
> F. 11, R. p. 48.

Beginning with the last sentence on page 71 of the Record the majority opinion states as follows:

> "In response to this price circular the producers would notify plaintiff at its Marietta office by mail, telephone or telegraph of the quantity, type and quality of the ties they could furnish, as well as the nearest loading point."

Reference to page 44 of the Record we think shows that there should have been added the statement:

> "or plaintiff's agent would make such arrangement with producers *in Indiana.*"

C. The measure of the tax was derived in its entirety from an Indiana source, therefore, there was nothing to apportion.

The majority opinion states:

> "We have stated heretofore the facts concerning the transactions constituting the source of income and shall not repeat. It is sufficient to point out that a sizeable portion of the business affording the source of income, was transacted outside the State of Indiana, both before and subsequent to the actual delivery of the ties to the railroad."

The majority opinion cites the decision in *Hans Rees' Sons v. North Carolina*, 283 U. S. 123 at 133. Reference to that authority indicates that the activities forming the basis of that allocation were revenue-producing activities exclusively. No expense items, or non-revenue producing activities, were mentioned or considered by the Court. This is precisely the rule for which the petitioners contend in this case: i.e., that the allocation of income is to be based upon the basis of activities which are revenue-producing in nature. All of the revenue-producing activities of the respondent in connection with the respondent's sale and de-

livery in Indiana of the ties to the Railroad took place in Indiana. Under such circumstances there was nothing to apportion.

It is submitted that the Circuit Court of Appeals in its majority opinion erred in holding and deciding that the income involved was not derived wholly from sources within the State of Indiana; that said Court erred in holding and deciding that there was no provision in the Act for allocating the tax to the income derived from that part of the business transacted in Indiana, it appearing clearly that the Act itself furnishes a perfect allocation in that the measure used is limited to income of non-residents derived from business and/or sources in the State of Indiana; and finally that said Court erred in holding and deciding that the burden was upon the petitioners to produce evidence that no income was used as a measure except such as was derived from business activities or sources within Indiana.

Four

The Commerce Was Not Interstate and the Tax Is Valid

(A discussion of No. 3 of the contested issues—see page 3 of Petition, and in support of grounds 10 and 11 of reasons for the writ—page 11 of the Petition.)

Two written contracts were introduced in evidence and appear as part of the findings. They may, for brevity of expression, be called the Central Creosoting Company contract and the Joyce-Watkins Company contract. The Joyce-Watkins Company contract is the only one of the two which contained any provision with reference to the sale and purchase of railroad cross-ties. It is not contended that this contract was executed in the State of Indiana, but it is contended that this contract as respects the sale and purchase of cross-ties is in the nature of an option and that the

resulting contract of sale involving a transfer of property from vendor to vendee actually took place in the State of Indiana.

Reliance apparently is placed on the statement on page 29, lines 14 to 22, of the Record embraced in the findings to the effect that: "All ties supplied to the railroad company have been supplied under that contract," referring to the Joyce-Watkins contract, but that does not suffice to show that the actual sale and transfer of property in the goods did not occur in the State of Indiana. The option granted in the Joyce-Watkins contract was, in effect, no more than an offer which did not actually culminate in a sale until after the cross-ties had been selected and accepted by the Railroad Company on its right-of-way in the State of Indiana. The goods were unascertained until the railroad inspector inspected them and selected them. Note the following from page 44 of the Record:

> "When the ties were ready at a loading point, an inspector of the plaintiff and of the Baltimore & Ohio Railroad Company would go to the loading point, and all ties accepted by the Railroad Company's inspector were loaded by the producer on cars of the Railroad. Ties rejected by the Railroad inspector were not loaded on cars or paid for by plaintiff."

In other words, title to rejected ties never passed from the producer to the respondent but title to those which were accepted by the Railroad Company did pass to the respondent in Indiana and thereupon immediately passed to the Railroad Company as a result of their selection and acceptance by its inspector. Under the Uniform Sales Act of the State of Indiana which has been in force since 1929,

> "Where there is a contract to sell unascertained goods no property in the goods is transferred to the

buyer unless and until the goods are ascertained," with certain exceptions not material here.

Burns' Indiana Statutes Annotated, 1933, Sec. 58-201.

To further emphasize the fact that the Joyce-Watkins contract was no more than an option, so far as the sale of cross-ties is concerned, note the following language, quoting from page 25 of the Record:

> "The Contractor agrees to sell to the Railroad all ties produced or purchased by it originating in territory from which ties in the usual course of business would be brought to the lines of the Railroad *to the extent that the Railroad may give orders to the Contractor for the purchase of such ties.*" (Our italics.)

But there was nothing in the contract which required the Railroad to order a single cross-tie from the contractor, as is clearly evidenced by the following language, quoting from page 26 of the Record, *viz*:

> "This contract shall not limit the right of the Railroad to purchase ties produced in territory adjacent to its lines or elsewhere *from others, nor require the Railroad to order ties from the Contractor except to the extent that it may see proper to do so.*" (Our italics.)

It should be noted, too, that the Contractor is not required to furnish ties to the Railroad except when the Contractor has produced or purchased ties originating in the territory from which in the usual course of business they would be brought to the lines of the Railroad.

In other words, under the Joyce-Watkins contract the Railroad Company had the right to order ties or *not* to order ties as suited its purpose, or even its whim and fancy,

and so long as the Contractor did not produce or purchase ties in the designated territory, it had a similar right. The Record shows that when orders were made the respondent *acknowledged* same by its agents at Marietta, Ohio, and proceeded to buy cross-ties in the State of Indiana for the purpose of filling the order. This was followed by an offer to sell to the respondent by producers in Indiana who made that offer by transporting the ties to the Railroad Company's right-of-way in Indiana where the purchase was made by the respondent and where the sale ultimately was made by the respondent to the Railroad Company. It is clear that the cross-ties were all produced within the State of Indiana and never left the State of Indiana until they were bought by The Wood Preserving Corporation in Indiana; (that is, The Wood Preserving Corporation received title in Indiana) and were again sold by The Wood Preserving Corporation in Indiana to the Railroad Company, which received title and took delivery in Indiana. No interstate commerce is involved in such a transaction. *The contract did not require interstate shipment of the ties, or any shipment whatsoever.*

Reliance apparently is placed upon that part of the Joyce-Watkins contract found at the top of page 23 of the Record, where the following language is used:

> "The Railroad agrees to deliver to the Contractor on cars at the Treating plant the ties and other forest products which it *desires* to have treated." (Our italics.)

Attention is called to the word "desires." It will be observed that the Joyce-Watkins contract deals with the subject of *treating* raw ties as well as with purchase and sale. The above language, however, is far from requiring the treatment of all ties bought by the Railroad Company.

It simply provides that all ties which the Railroad Company *desires* to have the respondent treat are to be delivered to the plant by the Railroad Company rather than by the respondent. But such a transportation by the Railroad Company of its own property for treatment by the National Lumber and Creosoting Co., was not interstate commerce. The transportation in such a case is separate and distinct from the sale which has been fully consummated by the passage of title and delivery to the Railroad Company on its own cars, on its own right-of-way in the State of Indiana. *The case is wholly unlike the case where the ultimate destination of the product as the goods of the buyer required delivery to the buyer across state lines.. Here the delivery to the Railroad Company had been completed in Indiana, and the only shipment across state lines was for the purpose of having a service applied to the products already fully owned by the Railroad Company; and even that shipment was wholly under the control of the Railroad Company. There was no requirement created either by the contract, the character of the goods purchased, or the character of the purchaser that the ties be transported.*

The majority opinion seems to proceed upon the theory that there was an agreement supplemental to the two written contracts already referred to embodied in oral directions to the respondent that all ties originating at points on the railroad west of the Ohio River (including Indiana) should be shipped by respondent to Finney, Ohio. This, of course, was not a modification of the written contracts, and was not a contract at all, but is significant of the two positions which petitioners have taken, namely, that the railroad company had the right at any time to change the destination of the raw ties which were being shipped for treatment, and also that the only shipment across state lines

was by the railroad company owner for the purpose of such treatment and not by the respondent, the extraordinary bill of lading to the contrary notwithstanding.

Under the facts in this case the place where title passes is important.

The form of the bill of lading, much like that in the case of *Superior Oil Company v. Mississippi*, 280 U. S. 390, is not sufficient to make an interstate transaction of one which is purely intrastate. As already pointed out, title to the raw ties in this case passed to the Railroad Company in the State of Indiana, a fact which can not be erased by the form of the billing used. In this connection, we desire to discuss the case of *Superior Oil Company v. Mississippi*, 280 U. S. 390, a case which we think the majority opinion fails to adequately appraise. In this case—i. e., the *Superior Oil Company* case—the oil company was a corporation created and doing business in Mississippi. It sold gasoline to packers in Biloxi, Mississippi, and delivered it to the packers' wharves in that state. The majority opinion seems to concede that the transaction was completed by this act of delivery notwithstanding the use of a bill of lading showing that the goods were to be transported and delivered to the packers at a point in Louisiana across state lines. This, in fact, is what the court held in the *Superior Oil Company* case, and we see no reason why the same reasoning should not apply to the present case. An examination of the case discloses that in the *Superior Oil Company* case a bill of lading was used very much like what is used in the present case, which recited that the oil was consigned to Gussie Fontaine Packing Company at Grant's Pass, Louisiana, via its own boat, Frank Louis, with the protective provision that the property remained the property of the oil company until it was delivered to

the Gussie Fontaine Packing Company at Grant's Pass, Louisiana.

In the *Superior Oil Company* case the Court brushed this paper transaction aside with the statement, quoting from pages 394 and 395:

> "The document hardly can affect the case, because it is 'not within the power of the parties by the form of their contract to convert what was exclusively a local business, subject to state control, into an interstate commerce business protected by the commerce clause.'"

In other words, by the form of the bill of lading the parties sought to "build up" the theory of a delivery to the Packing Companies at Grant's Pass, Louisiana, thus requiring shipment across state lines, whereas in fact delivery had already been made at Biloxi, Mississippi.

How like the present case the *Superior Oil Company* case is. The Railroad Company received title in Indiana. It was at liberty to do what it pleased with the ties when so received, but whether it was or not, the subsequent transportation was in order that an additional service should be applied to the ties in the treating process. Clearly the shipment by the owner of goods across state lines for the purpose of having someone other than the owner render an additional service does not constitute interstate commerce. Of course the transportation itself was interstate, but the element of "interstate commerce" as between the seller and the buyer is wholly lacking.

In this connection, we think the Court in the majority opinion has misinterpreted the time sequence in stating that, "Here there is not even a suspicion of an effort to avoid taxation. In fact the same course of business had been followed by the parties continuously since a period

prior to the enactment of the Act in question." The proper chronology is:

1. The Act was approved on February 27, 1933. Chapter 50, Indiana Acts of 1933, p. 388.

2. The date for the taking effect of the assessment feature of the Act was May 1, 1933.

3. The Joyce-Watkins contract was assigned to the respondent on May 3, 1933 (R. 29).

The fact that the title to the cross-ties passed in the State of Indiana and that at the same time delivery was made to the Railroad Company on its cars in the State of Indiana, is significant because it shows that the sale by the respondent and purchase by the Railroad Company was completed in the State of Indiana.

In our further amplification of the above proposition we desire to call the attention of the Court to the fact that the delivery by the Railroad Company of the cross-ties at Finney, Ohio, was to the Creosoting Company's plant for the purpose of having the creosoting process applied. It was not the case, therefore, where ultimate delivery and passage of title to the Railroad Company was to take place in another state. The delivery and passing of title to the Railroad Company as well as physical possession had taken place already in the State of Indiana. *The only delivery which took place in Finney, Ohio, was the delivery by the Railroad to the Creosoting Company.* In this particular the case is entirely different from the *Dahnke-Walker Co. v. Bondurant* case and other similar cases where, notwithstanding delivery to a common carrier f. o. b point of origin, such delivery is not conclusive on the question of whether the commerce is intrastate or interstate where it

was contemplated by the parties that ultimate delivery *to the purchaser* was to be made in another State. In the above case the plaintiff purchased grain in Kentucky for shipment *to its mill in Tennessee.* The Court looked beyond the initial delivery to the common carrier in Kentucky and found that the ultimate destination and delivery from the very first was the *plaintiff's mill in Tennessee.* The transaction there was held to be interstate commerce because the sale and purchase was not completed in Kentucky but actually involved a transportation of the property to the plaintiff *at its mill in Tennessee.*

In this case, even upon respondent's theory, it cannot be contended that ultimate delivery to the Railroad Company, the purchaser, was to be made at Finney, Ohio, or was in contemplation by the parties. *As a matter of fact, no delivery was made to the Railroad Company at Finney, Ohio, until after the treating was done and then a redelivery took place.* Delivery to it had been completed in Indiana from whence in its own cars, on its own right-of-way, it transported its own property to the Ohio plant for the creosoting treatment by the Creosoting Company, limited only to the stock "which it desires to have treated." It is important, therefore, that the title passed in the State of Indiana at which point the ties were loaded upon the Railroad Company's cars and at which point the Railroad Company received physical delivery.

The rule defining the limits of state taxation is not necessarily the same as where regulation alone is the object.

The majority opinion seems to hold the contrary. Since, however, the Supreme Court of the United States has so repeatedly indicated a different conclusion, we are constrained to point out again what the Supreme Court has

said in the case of *Swift & Company v. United States*, 196 U. S. 375, and *Stafford v. Wallace*, 257 U. S. 495. In the first of these cases the Supreme Court said, quoting from page 400:

> "Moreover, the sales are by persons in one State to persons in another. But we do not mean to imply that the rule which marks the point at which state taxation or regulation becomes permissible necessarily is beyond the scope of interference by Congress in cases where such interference is deemed necessary for the protection of commerce among the States."

In the second case, quoting from page 525, the Supreme Court used the following language:

> "The other cases relied on by appellants are less relevant to this discussion than the *Anderson* and *Hopkins Cases. Some of them are tax cases.* As to them it is well to bear in mind the words of the court in the Swift Case (p. 400):
>
> "'But we do not mean to imply that the rule which marks the point at which state taxation or regulation becomes permissible necessarily is beyond the scope of interference by Congress in cases where such interference is deemed necessary for the protection of commerce among the States.'" (Our italics.)

Clearly the Supreme Court intends to imply that there is a difference between *regulatory* cases and *tax* cases, and that where *regulation* is the objective it may extend to transactions which, considered alone, are intrastate but when considered in their relation to other transactions they become interstate. On the other hand, the thought is that where *taxation* of some activity is the object, the taxation of activities which are purely *intrastate* will not be inter-

fered with upon the basis of the commerce clause merely because, when considered in its relation to other transactions, it might perchance be regarded as a step in a plan which is subject to *regulation*. Nor does the case of *Minnesota v. Blasius*, 290 U. S. 1, cited in the majority opinion, hold otherwise. It is quite true that the Court in its opinion in that case does not refer to the distinction; but more important than what the Court omitted to say is what the Court actually did. What the Court did, undoubtedly, was to give recognition to the difference by sustaining the tax.

Moreover, a transaction may be interstate commerce or intrastate commerce depending upon the person involved, as was said by the Court in the case of *United States v. Sutherland*, 9 Fed. Supp. 204 at page 207:

> "When a lumber merchant or any other type of merchant or one not a merchant sells a thing in the state of Missouri to a resident of Missouri, that transaction certainly is altogether intrastate. If the person to whom he sells is a resident of Iowa and will take the thing purchased to Iowa, the transaction between the vendor and vendee still is altogether intrastate. The transaction is completed when the sale is made. What the purchaser does with the thing bought certainly cannot affect the nature of the transaction between him and the seller. The purchaser indeed is engaged in interstate commerce if he transports the thing bought to another state, but the seller is not. It is impossible to elaborate a truth so simple."

We think it is abundantly shown in this case that the measure of the tax is derived solely from an intrastate activity, and that the levy, using that basis, is valid.

On the grounds stated in the petition, and for the reasons more fully stated in the brief, it is respectfully

submitted that a writ of certiorari should be granted and the decision of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

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No. 654

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. CLIFFORD TOWNSEND, PETER F. HEIN, LAWRENCE F. SULLIVAN AS AND CONSTITUTING THE BOARD OF DEPARTMENT OF TREASURY OF THE STATE OF INDIANA,

Petitioners,

v.

THE WOOD PRESERVING CORPORATION,

Respondent.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF PETITIONERS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

No. 654

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. CLIFFORD TOWNSEND, PETER F. HEIN, LAWRENCE F. SULLIVAN AS AND CONSTITUTING THE BOARD OF DEPARTMENT OF TREASURY OF THE STATE OF INDIANA,

Petitioners,

v.

THE WOOD PRESERVING CORPORATION,

Respondent.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONERS' BRIEF

I

The Opinion of the Court Below

The opinion of the Circuit Court of Appeals in *Wood Preserving Corporation* v. *Department of Treasury of Indiana* was rendered on July 20, 1940, and is reported at

114 Fed. (2d) 922; it is also reproduced in the Record at pages 70 to 83. The petition for rehearing was overruled on October 5, 1940, as appears in the Record at page 84. (This court granted the writ of certiorari on February 3, 1941.)

II

Statement of the Case

This action, originally instituted in the District Court of the United States for the Southern District of Indiana, Indianapolis Division, and thereafter appealed to the United States Circuit Court of Appeals for the Seventh Circuit, the same being Cause No. 7126 in said Circuit Court of Appeals, was an action to recover taxes collected by the petitioners under the Indiana Gross Income Tax Act of 1933 (Chap. 50, Ind. Acts 1933, Burns Indiana Statutes Annotated, 1933, Sec. 64-2601, et seq. Baldwin's Indiana Statutes, 1934 Ed. 15981 et seq.).

The petitioners herein were successful in the District Court. An appeal was taken by The Wood Preserving Corporation resulting in a reversal of the decision of the District Court. 114 Fed. (2d) 922. The writ of certiorari was granted by this court on February 3, 1941.

The Facts

The facts in the case were largely stipulated, and the District Court adopted them with some rather minor additions, as his findings of fact. They may be summarized as follows:

a. Respondent, The Wood Preserving Corporation, is organized under the laws of the State of Delaware, and is engaged in the business of producing, purchasing and

selling ties and timber. Its principal place of business is at Pittsburgh in the State of Pennsylvania. However, it maintains an office at Marietta, Ohio, at which offers to purchase untreated cross-ties were received via telephone from the purchasing agent of the Railroad Company at Baltimore, Maryland (F. 8(d), R. 38, ll. 26-34). It is qualified to do business in Indiana (F. 1, R. 20, ll. 35-45), but maintains no office there other than an office in the City of Indianapolis for the service of process and, in addition thereto, normally had one agent or employee assigned to the Indiana territory who was engaged in the buying of ties and was responsible to the respondent's Marietta office. In addition, respondent's District Manager of Production and Operation, with his headquarters at respondent's Marietta, Ohio, office made periodical trips to Indiana to interview people with whom respondent did business, in relation to complaints, giving them assistance, and to handle other matters that were beyond the authority of the field man's normal scope (F. 11, R. 48, ll. 28-41).

b. The Railroad Company, by telephone calls from its purchasing agent at Baltimore, Maryland, advised a representative of the respondent at its office at Marietta, Ohio, of the ties to be required by the Railroad and the price which it was willing to pay f. o. b. cars at loading point (F. 8(d), R. 38, ll. 26-32).

c. Subsequent to the receipt of the telephone order from the purchasing agent of the Railroad, the respondent prepared and mailed to known producers of cross-ties in the State of Indiana and elsewhere, a price list stating the size, quality, and kind of ties which respondent would accept at loading points along the right-of-way of the Baltimore & Ohio Railroad, and the prices which it would

pay for such ties (F. 8(d), R. 38, ll. 35-41). The circular so prepared by the respondent contained the following provisions:

> "The above prices are on the ground and we pay additional for loading to cars.
> "Our inspectors make immediate payment by sight draft at time of inspection."
> R. 39.

> "When ties are piled at loading points on the B. & O. Railroad according to the above and our specifications, each pile should be marked with a tag on which is written 'For The Wood Preserving Corporation' and the owner's name and address."
> R. 39.

> "Each stack shall have fastened to it a tag on which is written, 'for The Wood Preserving Corp.' the owner's name and address, the date when stacked, and the number of ties of each kind of wood in the stack."
> R. 43.

d. Producers having available supplies of ties and being willing to furnish the ties at the prices stated in respondent's price list, would notify by mail, wire, or phone, the Marietta office of the respondent, or respondent's agent would make such arrangements with producers in Indiana (F. 8(d), R. 44, ll. 17-24).

e. When the ties were ready at a loading point, an inspector of the respondent and an inspector of the Baltimore & Ohio Railroad Company would go to the loading point, and all ties accepted by the Railroad's inspector were loaded by the producer on cars of the Railroad. Ties rejected by the Railroad inspector were not loaded on cars or paid for by the respondent (F. 8(d), R. 44, ll. 30-36).

f. A shipping report was made out by the respondent's agent, and one copy sent to the respondent's Marietta office and one to the National Lumber and Creosoting Company at Finney, Ohio (F. 8(d), R. 44, ll. 37-40). Also at the end of each day the Railroad inspector prepared an inspection report of the ties accepted, and furnished a copy of the report, in duplicate, to respondent's inspector. Upon the basis of this inspection report, respondent's inspector, by drafts on banks outside of the State of Indiana, settled with the producer for the ties accepted at the points of loading within Indiana. The amount of the drafts was predicated upon the price lists, plus the loading charges above referred to, if any (F. 8(d), R. 45, ll. 13-21).

g. All of the ties originating in Indiana were delivered to the Railroad Company f. o. b. cars at points of origin within Indiana (F. 9, R. 48, ll. 1-4).

h. The respondent's agent, while within the State of Indiana, forwarded the following:

1. One copy of the shipping report prepared by respondent's agent to the respondent's Marietta office (F. 8(d), R. 44, l. 37, to R. 45, l. 12).

2. One copy of shipping report of respondent's agent to National Lumber and Creosoting Company at Finney, Ohio (F. 8(d), R. 44, ll. 36-40).

3. One copy of shipping report of respondent's agent to the Baltimore, Maryland, office of the Railroad Company (F. 8(d), R. 45, ll. 25-29).

4. One copy of the respondent's draft used in paying the producer, to the respondent's Marietta, Ohio, Office (F. 8(d), R. 45, ll. 21-25).

5. One copy of the railroad inspector's report to respondent's Marietta office (F. 8(d), R. 45, ll. 21-25).

6. One copy of the billing of cars to the Baltimore, Maryland, office of the Railroad Company (F. 8(d), R. 45, ll. 25-29).

i. At the end of each day's loading of ties along the right-of-way of the Railroad in Indiana, the ties were billed by the respondent's agent in the name of The Wood Preserving Corporation, to the Baltimore & Ohio Railroad Company in care of the person who was at the time chief engineer of maintenance of the Railroad Company stationed at Finney, Ohio (F. 11, R. 48, l. 42, to R. 49, l. 2). The respondent paid no freight to the Railroad Company for transporting to Finney the ties so loaded in Indiana and billed to the Railroad Company as above stated (F. 11, R. 49, ll. 5-8).

j. At the end of each week the respondent's Marietta office prepared an invoice against the Railroad Company for ties inspected, reported, sold, and delivered to the Railroad Company during the previous week, as shown by the inspection reports, and forwarded this invoice to the Baltimore, Maryland, office of the Railroad Company (F. 8(d), R. 45, ll. 29-37).

k. Payments to the respondent for the untreated ties so furnished were made in the regular course of business by the Baltimore & Ohio Railroad by checks drawn on banks located in cities outside of the State of Indiana, mailed to the respondent's Pittsburgh, Pennsylvania, office, and deposited there (F. 8(d), R. 47, ll. 5-10).

l. All of the ties originating in Indiana during the years of 1934, 1935, and 1936, which were sold to the Railroad Company by the respondent were delivered to the Railroad Company f. o. b. cars at points of origin within Indiana, and were carried by the Railroad Company from the points of origin in Indiana to the National Lum-

ber & Creosoting plant at Finney, Ohio (F. 9, R. 48, ll. 1-11). These ties were transported to the Finney, Ohio, treating plant for the purpose of having the same treated and no freight charges were paid to the Railroad Company for transportation of said ties from points of origin in Indiana to the Finney plant (R. 49).

III

Specification of Errors

The contested issues are as follows:

1. Whether the taxes herein sought to be recovered are valid within the purview of the due process clause of the Fourteenth Amendment to the Federal Constitution. The petitioners contend that the taxable event as respects respondent, a non-resident of the State of Indiana, is the fact that said respondent is engaged in business within the State of Indiana, and derives gross income from sources within the State of Indiana.

2. Whether the taxes herein sought to be recovered are valid within the purview of the due process clause of the Fourteenth Amendment to the Federal Constitution. The petitioners contend that the gross receipts which were the measure of the tax assessed and collected were derived from a source entirely within the State of Indiana, and that there was no evidence adduced before the United States District Court, and no finding of fact, which shows that the gross receipts derived from the sale of raw ties in Indiana were either in whole or in part derived from a source outside the State of Indiana.

3. Whether the taxes herein sought to be recovered were improperly assessed and collected in violation of

the commerce clause, Article I, Section 8, of the Federal Constitution. The respondent's claim is that such taxes are laid upon receipts derived from interstate commerce, that they constitute a direct burden on such commerce, and are of a type which subjects the commerce to the risk of multiple taxation of like kind in other states. The petitioners, on the other hand, contend that the receipts forming the measure of the tax are not derived from interstate commerce, that the tax does not constitute a direct burden on interstate commerce, and that such tax is not of a type which subjects the commerce to the risk of multiple taxation of like kind in other states on the sole ground that interstate commerce is being done.

IV

Summary of the Argument

One

The Act itself designates, in section 2 thereof, the taxable event, which in the case of the respondent, a non-resident of the State of Indiana, is engaging in business in the state or deriving gross income from sources within Indiana.* The respondent, a non-resident of Indiana, engaged in the business of purchasing, selling, and delivering untreated cross-ties within the State of Indiana. The taxable event on which the taxes were levied was wholly within the State of Indiana, and did not impinge upon the due process clause of the Fourteenth Amendment to the Constitution of the United States.**

*Sec. 2, Chapter 50, Indiana Acts 1933, p. 388 at p. 390;

**See: *Storen, etc., et al.* v. *J. D. Adams Mfg. Co.* (1937), 212 Ind. 343, 7 N. E. (2d) 941 at 946;

J. D. Adams Mfg. Co. v. *Storen* (1938), 304 U. S. 307 at 308, and at 310;

Also: *Miles, et al.* v. *Department of Treasury* (1935), 209 Ind. 172 at 178, 199 N. E. 372 at 378-379;

Indiana Creosoting Co. v. *McNutt* (1936), 210 Ind. 656, at 663, 664, 5 N. E. (2d) 310 at 313;

********Equitable Life Society* v. *Pennsylvania* (1915), 238 U. S. 143, 35 Sup. Ct. 829, 59 L. Ed. 1239;

Shriver v. *Pittsburgh* (1876), 66 Pa. 446;

F. 1, R. 20, ll. 33-34; F. 8(d), R. 47, ll. 22-24; F. 9, R. 48, ll. 1-4; F. 11, R. 49, ll. 32-36.

Two

In holding, upon the evidence already summarized, that "a sizable portion of the business affording the source of income, was transacted outside of the State of Indiana both before and subsequent to the actual delivery of the ties to the Railroad," thereby concluding that the state had no jurisdiction to tax in the absence of an apportionment, the Circuit Court of Appeals has rendered a decision in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in the case of *Dravo Contracting Company* v. *James*, reported in 114 Fed. (2d) at p. 242, certiorari denied, January 14, 1941. It would appear from the opinion of the Circuit Court of Appeals for the Seventh Circuit in the present case that the "sizable portion of the business affording the source of income" to which the opinion refers is the bookkeeping, invoicing, and general office activities of the respondent which were carried on outside of the state; however, it seems apparent that these were not income-producing activities and that they are not, in the true sense, the

source of the respondent's income used as a measure of this tax.

The *source* of respondent's income derived from the sale of tangible property is the tangible property itself, and the source of the income is not affected by the place at which the incidental items of bookkeeping, invoicing and office transactions took place.

Three

The total receipt which was the measure of the tax was derived from business engaged in and from a source within Indiana: For all of the gross income used as the measure of the tax represented the purchase price of the raw, untreated cross-ties which respondent acquired, sold, and delivered in Indiana. The purchaser did not purchase or pay for anything other than the raw, untreated cross-ties delivered to it in Indiana, and more particularly did not pay for any manufacture or fabrication in another state, nor purchase additional performance by respondent of any part of the sales contract in another state. There can be no question but that the source of the respondent's gross income used as the measure of this tax was: (a) the procuring within Indiana of the raw cross-ties from the producers thereof (R. 44); (b) the acceptance of the Railroad's offer to purchase ties which was the respondent's action taken within Indiana giving rise to the contract of sale resulting in the receipts in question (see option: F. 8(a), R. 25; offer to purchase: F. 8(d), R. 38, ll. 26-41; acceptance by acquisition of ties: F. 8(d), R. 44, ll. 30-36); and (c) respondent's unconditional delivery within Indiana of the ties to the purchaser (R. 44, 48). No part of the measure was contractual compensation for any additional acts performed by the respondent in any other

state as a part of the sales contract. There was nothing, therefore, to apportion.

Pittsburgh Life and Trust Co. v. *Young* (1916), 172 N. C. 470, 90 S. E. 568 at 573.

This action seeks a refund. The primary burden of proof with reference to apportionment, if any is justified, is upon the respondent by virtue of its instituting the action as the plaintiff. In addition, the taxing acts itself places the primary burden of making the assessment upon the taxpayer, who consequently has the affirmative burden of claiming an apportionment if one is believed due or necessary, and the burden of making the proper apportionment so that the measure of the tax will embrace only receipts from a source or business activities within Indiana. One attacking the constitutionality of a tax upon the thesis that income is properly ascribed to income-producing activities carried on in other states should establish by virtue of its role in the litigation the amount of income which it claims is properly within the taxing jurisdiction of the second state. Then too, it is the plaintiff, not the defendant, in a refund case who has the peculiar knowledge necessary to establish the apportionment, so that the plaintiff correctly bears the burden of proof.

Significant it is that the respondent did not introduce evidence proving what part, if any, of the purchase price of the raw cross-ties was derived from sources outside of Indiana.

Underwood Typewriter Co. v. *Chamberlain* (1920), 254 U. S. 113 at 120, 121;

Bass, Ratcliff and Gretton, Ltd., v. *State Tax Commission* (1924), 266 U. S. 271 at 280-283.

Section 2 of the taxing Act automatically provides that a separation of income be made, as it includes within the

measure of the tax as applied to non-residents such as the respondent *only* that portion of the receipts attributable to business transacted within the state or sources there.

Sec. 2, Chapter 50, Indiana Acts 1933, p. 388 at p. 390:: 11 Burns Indiana Statutes Annotated, 1933 Ed., 64-2602:: Baldwin's Indiana Statutes, 1934 Ed., 15,982.

The tax here is not upon a unitary enterprise conducted in several states, but exclusively upon respondent's income derived from business completed in Indiana.

Four

The gross receipts which are used as the measure of the tax are derived solely from intrastate transactions, from which it follows that the Commerce Clause of the United States Constitution is not violated.

A. Goods bought in one state for transportation to another state in cases where title passes in the latter state constitutes interstate commerce in its simplest conception. Upon the same principle it is held that where there was a regular course of business contemplated by the parties which took the goods sold into another state as an essential part of the transaction, and where by mutual agreement such goods are put into the hands of a third person, a common carrier, for transportation to the latter state,—that in such case interstate commerce is involved. But, where the buyer accepts delivery and title upon its own property in the seller's state and the subsequent transportation is made via the buyer's transportation facilities, the transaction is intrastate notwithstanding the seller

may at the time have known of the course of business whereby the buyer was to make further transportation of such goods.

Superior Oil Company v. *Mississippi*, 280 U. S. 390, at pp. 394-395.

B. The transaction between the respondent and the railroad company resulting in the gross receipts (purchase price of cross-ties) was wholly intrastate. The transportation to Finney, Ohio, relied upon as establishing the claim of interstate commerce, was made by the railroad company over its own lines without the payment of freight or other charge after having first accepted title and delivery upon its own right-of-way, in Indiana, and for the sole purpose of having the cross-ties treated by the National Lumber and Creosoting Company. The transportation in such a case and for such a purpose is not interstate commerce.

Eastern Air Transport Company, Inc. v. *South Carolina Tax Commission, et al.*, 285 U. S. 147, at pp. 152-153;

Superior Oil Company v. *Mississippi*, 280 U. S. 390, at pp. 394-395.

C. The transportation by the railroad company of its own product via its own lines does not constitute interstate commerce; and it makes no difference how title was acquired so long as it was acquired by virtue of a simple intrastate transaction.

The Pipe Line Cases, 234 U. S. 548, at pp. 561-562.

D. That the property transported is for the ultimate use of the buyer who is also the carrier is to be considered

with other facts in determining whether interstate commerce is involved.

Eastern Air Transport Company, Inc. v. *South Carolina Tax Commission, et al.*, 285 U. S. 147, at pp. 152-153.

E. The intention and contemplation of the parties is wholly immaterial where the transaction is clearly intrastate. In other words, a transaction which is clearly intrastate is not converted into an interstate transaction by the intention of the parties to that effect.

Superior Oil Company v. *Mississippi*, 280 U. S. 390, at p. 395.

F. The "multiple taxation doctrine" has nothing to do with the *determination* of the question whether interstate commerce is or is not involved. On the contrary, it has to do with the question as to whether a given tax is a *burden* when interstate commerce has been otherwise made to appear. There is no legal objection to double taxation in different jurisdictions; in fact, double taxation in a legal sense does not exist unless the double tax is levied upon the same property within the same jurisdiction.

Ohio Tax Cases, 232 U. S. 576, at p. 593;

Wright v. *Louisville and Nashville R. R. Co.*, 195 U. S. 219, at p. 222;

Kidd v. *Alabama*, 188 U. S. 730, at p. 732.

V

ARGUMENT

Preliminary

The petitioners in this brief will present the questions raised in the order in which they appear in the petition.

One

The Taxable Event

The majority opinion of the Circuit Court of Appeals in stating the contentions of the parties as to what constitutes the taxable event used the following language:

> "It is contended by the plaintiff that the event was the receipt of gross income which occurred in Pennsylvania. If this position is sound, it is evident —in fact, not disputed—that the State of Indiana was without power to levy and collect the tax. It is defendants' contention as stated in their brief, that 'the thing which the Statute authorizes as the taxable event, the thing which was taxed, is the transaction which occurs within Indiana involved in one of two things, either doing business within the state or deriving income from a source within the State.' Under this theory, the gross income received in Pennsylvania is merely the measure fot the tax."

We agree with this statement respecting the contentions of the parties, and we agree also with the statement im-

mediately following to the effect that "under this theory," (referring to petitioners' theory) "the gross income received in Pennsylvania is merely the measure for the tax." Indeed, the statute very clearly states that the gross receipts in any event, are not themselves taxed but constitute the measure for the tax. Note the language of Section 2 of the Act wherein it is provided:

> "There is hereby imposed a tax, measured by the amount, or volume, of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided."...

If we can admit that a statute which is so clear upon the present issue requires construction in the technical sense, we perhaps can conceive the next statement of the majority opinion to the effect that "the respective contentions require a construction of the Statute relied upon as a measure for the tax" but we are wholly unable to bring ourselves in agreement either with the result reached by the majority opinion or the reasoning through which that result was reached.

Significant and important it is *that the Act itself designates,* in section 2, *the taxable event,* which in the case of the respondent, a non-resident (F. 1, R. 20, ll. 24-28), is the engaging in business in the state or deriving gross income from sources within Indiana. The exact language utilized by the Indiana General Assembly in so specifying the taxable event is:

> "There is hereby imposed a tax, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. *Such tax shall be levied* upon the entire gross income of all residents of the State of Indiana, and *upon the*

gross income derived from sources within the State of Indiana, of all persons and/or companies, including banks, who are not residents of the State of Indiana, but are engaged in business in this state, or who derive gross income from sources within this state, and shall be in addition to all other taxes now or hereafter imposed with respect to particular occupations and/or activities. Said tax shall apply to, and shall be levied and collected upon, all gross incomes received on or after the first day of May, 1933, with such exceptions and limitations as may be hereinafter provided."

Sec. 2, Chapter 50, Indiana Acts 1933, p. 388 at p. 390.

It is apparent that the language particularly applicable to the respondent, a non-resident (F. 1, R. 20, ll. 24-28), is the italicized language which, telescoped, is as follows:

"Such tax shall be levied upon the gross income derived from sources within the State of Indiana, of all persons and/or companies, including banks, who are not residents of the State of Indiana but are engaged in business in this state, or who derive gross income from sources within this state."

The statutory language is plain, is clear, and is unambiguous. It requires no legal construction or interpretation. It establishes the fact that insofar as the Act applies to non-residents (of which the respondent is one), the taxable event is deriving gross income from business transacted in Indiana or from sources within the State of Indiana, irrespective of where the actual physical receipt took place.

Just what constitutes the taxable events under the Act has been commented upon by the Indiana Supreme Court in three of its decisions, and by the United States Supreme

Court in one of its decisions, and, as we shall show in every decision involving this particular Act, the Courts have been very careful to point out that there are two taxable events, i.e., one for residents, and a separate and distinct taxable event insofar as non-residents are concerned.

Every decision which has commented upon the taxable events under this particular statute has recognized as valid the foregoing claims with respect to what constitutes the taxable event, even including—we insist—the case of *Adams Manufacturing Company* v. *Storen*, 304 U. S. 307, so much relied upon in the majority opinion of the Circuit Court of Appeals in this case. Before touching upon the Adams case, however, we desire to refer to the decisions of the Court of last resort in the State of Indiana on that subject.

We respectfully direct the attention of the Court first to the opinion of the Indiana Supreme Court in *Miles, et al.* v. *Department of Treasury* (1935), 209 Ind. 172 at 188, 199 N. E. 372 at 378-379, 101 A. L. R. 1359, which (in part) reads as follows:

> "*We conclude that the tax in question is an excise, levied upon those* domiciled within the state *or who derive income from sources within the state, upon* the basis of the privilege *of domicile or the privilege of transacting business within the state,* and that the burden may reasonably be measured by the amount of income. The reasoning which justifies a tax upon the basis of domicile as readily supports and justifies a tax upon the basis of the right to receive income within, or transact business under the protection of, the state. We feel that the weight of reason and authority sustains this view."

The Supreme Court of Indiana repeated this interpretation of the identical Act here under consideration in its

opinion in *Indiana Creosoting Co.* v. *McNutt* (1936), 210 Ind. 656, 663, 664; 5 N. E. (2d) 310 at 313, where it said:

> "* * * * The gross income tax is an excise tax, and is measured by the receipt of gross income. In the case of *Miles* v. *Department of Treasury* (1935) 209 Ind. 172, 199 N. E. 372, 379, 101 A. L. R. 1359, the court, in considering the Gross Income Tax Act, said (page 188): 'We conclude that the tax in question is an excise, *levied upon* those domiciled within the state or *who derive income from sources within the state, upon* the basis of the privilege of domicile or the *privilege of transacting business within the state,* and that the burden may reasonably be measured by the amount of income. The reasoning which justifies a tax upon the basis of domicile as readily supports and justifies a tax upon the basis of the right to receive income within, *or transact business under the protection of, the state.*'"

Parenthetically, it should be noted that while this case differs from the *Indiana Creosoting Company* appeal in that the plaintiff there was a resident of Indiana (5 N. E. (2d) at 311), while the present respondent is a non-resident (F. 1, R. 20, ll. 24-28), the two cases have points of similarity in that:

(a) in the *Indiana Creosoting* case

> "the book accounts were kept in Louisville; that the money received in payment of accounts was sent to the office in Louisville" (*i.e.*: from the Chicago office of the Chicago, Indianapolis and Louisville Railway Company), "and the bills for supplies and material were paid at the same place". (5 N. E. (2d) at 312),

while in this appeal the respondent receives the gross income from its Indiana business in Pittsburgh and deposits it there; and

(b) the Indiana Creosoting Company claimed to be engaged in interstate commerce although (as is the situation of the respondent) it was not obliged to ship the ties to points outside of Indiana but delivered the ties to the railway company at Bloomington, Indiana (5 N. E.. (2d) at 312), while in this appeal this respondent is not obliged to make delivery of the ties across state lines to the purchaser at points outside of Indiana, but actually made delivery at points of origin within Indiana (F. 9, R. 48, ll. 1-4).

Practically the same language, quoted herein from the *Miles* (209 Ind. 172 at 188), and the *Indiana Creosoting Company* (210 Ind. 656), cases, was repeated by the Indiana Supreme Court in *Storen, etc. et al.* v. *J. D. Adams Mfg. Co.* (1937), 212 Ind, 343, 7 N. E. (2d) 941 at 946. And as we shall hereafter show, the United States Supreme Court indicated that it recognized the Act's language defining the taxable event insofar as non-residents were concerned when it said:

> "* * * Section 2 imposes a tax ascertained by the application of specified rates to the gross income of every resident of the State *and the gross income of every nonresident derived from sources within the state.* * * *"
>
> *J. D. Adams Mfg. Co.* v. *Storen* (1938), 304 U. S. 307 at 308.

> "The tax is not an excise for the privilege of domicile alone, since *it is levied upon the gross income of non-residents from sources within the State.*"
>
> *J. D. Adams Mfg. Co.* v. *Storen* (1938), 304 U. S. 307 at 310.

The repeated determination of the Indiana Supreme Court with reference to the existence of two taxable

events; i.e., one for residents and another for non-residents, was confirmed by the opinion of the United States Supreme Court in the case of *J. D. Adams Mfg. Company v. Storen* (1938), 304 U. S. 307. At the outset we find from the statement of facts (304 U. S. at 308) that the appeal there considered differed materially from the situation here presented, since the J. D. Adams Mfg. Company was an Indiana corporation, while contrariwise The Wood Preserving Corporation is a non-resident of Indiana. (F. 1, R. 20, ll. 24-28).

But the United States Supreme Court in determining the *Adams* appeal indicated that it was aware of the Act's language with reference to the taxable event insofar as non-residents were concerned when it pointed out:

> "* * * Section 2 imposes a tax ascertained by the application of specified rates to the gross income of every resident of the state and the gross income of *every non-resident derived from sources within the State.* * * *"
>
> *J. D. Adams Mfg. Co.* v. *Storen* (1938), 304 U. S. 307 at 308.

> "The tax is not an excise for the privilege of domicile alone, since it is levied upon the gross income of *non-residents from sources within the State.*"
>
> *J. D. Adams Mfg. Co.* v. *Storen* (1938), 304 U. S. 307 at 310.

And th dissenting opinion concurred with the majority in this particular, utilizing the following language:

> "The Indiana statute of 1933 here invalidated imposes 'a tax, measured by the amount or volume of gross income, ... upon all residents of the State of Indiana, and upon the gross income *derived*

from sources within the State of Indiana, of all persons and . . . companies . . . who are not residents of Indiana, but are engaged in business in Indiana.'"

J. D. Adams Mfg. Co. v. *Storen* (1938), 304 U. S. 307; diss: at 316.

Section 2 of the Act in specifying that as to non-residents the taxable event is deriving gross income from sources within Indiana or engaging in business within the state is clear, unambiguous, and does not require construction or interpretation. It means precisely what it says. The earlier parts of section 2 had provided a method for the taxation of residents of the state. It was recognized, however, that there were many non-residents, both corporate and individual, who were doing, or would do, business in the State who, so far as those transactions were concerned, should be taxed in the same manner and to the same extent that residents of the state were taxed. The purpose of the last above-quoted language from the Act was very apparently to reach that class of persons or corporations who, although non-residents, were either doing business within the state or deriving gross income from sources within the state, irrespective of where the physical receipt of the gross income occurred.

The majority opinion in this case to support its construction of the non-resident provision makes the following statement:

> "It appears to us that the non-resident provision of the Act upon which defendants rely, was intended to apply to persons not legal residents of the State, but living, temporarily, or engaged in business in the State *and receiving income there.*" (Our italics).

But this is no justification for the construction which the Court has made. If this is all that the non-resident provision means then there was absolutely no reason for the non-resident provision at all. That is, from the draftsman's standpoint, they might just as well have been treated together. In other words, if the sole test was to be the locale of the actual physical receipt of the income, then all references within the Act to residents and non-residents, to engaging in business, or to sources of the income, were manifestly superfluous.

From the foregoing it is apparent that the construction of the Act adopted by the majority opinion in the instant case, runs counter to the authoritative decisions of the Indiana Supreme Court in three cases and the United States Supreme Court in the Adams case which was relied upon by the respondent in the Circuit Court of Appeals.

Attention is also directed to the result of this new construction of the Act by the Circuit Court of Appeals. It permits one whose entire income is derived from business done in the State of Indiana and the depletion of natural resources of that State, to escape taxation by arranging to have the actual physical receipt of the income, generated wholly from Indiana sources, to take place outside of the State.

Wisconsin v. J. C. Penney Co., No. 46 decided by United States Supreme Court, Dec. 16, 1940.

Two

The source of income derived from the sale of tangible property is the tangible property itself, and is not affected by the situs of bookkeeping, invoicing, or incidental office transactions which may have taken place in another taxing jurisdiction.

It is apparent that the decision of the Circuit Court of Appeals for the Seventh Circuit in this present case is in conflict with the decision of the Circuit Court of Appeals of the Fourth Circuit in the case of *Dravo Contracting Company* v. *James*, 114 Fed. (2d) 242), decided September 6, 1940. In this present case the Court holds that a sizable portion of the business affording the source of income was transacted outside the State of Indiana both before and subsequent to the actual delivery of the ties to the Railroad Company. The basis for this statement evidently is what had earlier been referred to, in the opinion of the Court involving the question of bookkeeping, invoicing, and matters of similar character. We contend that such matters are not to be considered in determining the question as to the source of the gross income. An examination of the case of *Dravo Contracting Company* v. *James, supra,* reveals very clearly that the Court in that case was excluding services of a much more applicable character in determining the source of the gross income which was the measure of the West Virginia tax. The Court in the *Dravo* case makes it very clear that a state may tax what is carried on within its borders measured by income received, although it may depend upon transactions extending beyond the state's borders. As was stated by the Court on page 247, 114 Fed. (2d) 247,

> "'The power to tax income derived from contracting within the state is not affected by the fact that materials for use under the contract may be brought from without the state, or that they may have been prepared by the contractor without the state for use under the contract.'"

Much less should the items of bookkeeping, invoicing, and office transactions be held to affect the question of the source of the income of a sale completed in a state other than the second state which was the situs of the bookkeeping and office transactions.

Three

No Apportionment Was Necessary

A. The Act provides a perfect method of separation.

The majority opinion of the Court ignores the fact that, insofar as non-residents are concerned, the Act provides that the tax is to be measured exclusively by receipts from transacting business within the State. The language applicable to the respondent reads:

> "Such tax shall be levied * * * upon the gross income derived from sources within the State of Indiana, of all persons and/or companies, including banks, who are not residents of the State of Indiana, but are engaged in business in the state, or who derive gross income from sources within this state, * * *"

The foregoing language has been judicially interpreted to mean *that as to non-residents the tax is on the basis of the privilege of transacting business within the state.*

> *Miles et al.* v. *Department of Treasury* (1935), 209 Ind. 172 at 188, 199 N. E. 372 at 378-379, 101; A. L. R. 1359.

Thus construed, it is at once apparent that the portion of section 2 of the Act dealing with non-residents auto-

matically provides for an allocation of income *since it taxes only that portion of the income attributable to business transacted within the state.* The Act clearly indicates that non-residents are to pay *only* on that portion of their income which an apportionment indicates is allocatable to business transacted in Indiana. Incidentally, since the taxing act deals with *gross,* and not net income, it was unnecessary to resort to calculus or to an involved formula of allocation. In *gross* income taxation the limitation of the tax on non-residents to income attributed to business transacted within the state results in a perfect apportionment. The difference between net and gross income tax measures, insofar as allocation is concerned, is that in *net* income taxation the allocation computation necessarily starts off with a comprehensive aggregate of all receipts derived from every source and, therefore, includes amounts admittedly beyond the taxing jurisdiction of any single state. In gross income tax measures (such as the Indiana Act) usually the only amount utilized is limited to receipts derived from business transacted *in the state.*

This distinction has recently been recognized by the United States Circuit Court of Appeals for the Fourth Circuit in dealing with a similar question under a West Virginia statute, where the measure of the tax was gross receipts, as is the situation here. That court said:

> "The holding of the Hans Rees Sons case is that a state income tax upon a unitary enterprise conducted in several states is void if it allocates an unreasonable portion of the income to the taxing state. The tax here is not upon a unitary enterprise conducted in several states, but upon the business of contracting conducted in West Virginia, and

income derived from that business is properly subject to taxation by that state."

Dravo Contracting Co. v. *James* (1940), 114 Fed. R. 2d Series 242 at 246,—Cert. Den. Jan. 14, 1941.

The situation presently before this Court is similar, since no attempt is made by Indiana to impose a tax upon non-residents as a unitary enterprise, conducted in several states, but Section 2 of Chapter 50 of the Indiana Acts of 1933 strictly limits the income to be used as the measure of the tax to receipts derived from business activities forming a source of such income within the State of Indiana.

A comparison with the Indiana statute of the revenue measure in the case of *Hans Rees' Sons* v. *North Carolina*, 283 U. S. 123, relied upon by the Court in the majority opinion, constitutes a perfect illustration of what we have just pointed out. Note the language of the North Carolina statute:

"Every corporation organized under the laws of this State shall pay annually an income tax, equivalent to four per cent of the entire net income as herein defined, received by such corporation during the income year; and every foreign corporation doing business in this State shall pay annually an income tax equivalent to four per cent of a proportion of its entire income to be determined according to the following rules:"

Necessarily, a net income taxing act requires an apportionment formula because it uses aggregate amounts from the entire unitary business. In the Indiana Act the basis of taxation is defined accurately and limited to that which is

derived from business within the state. No comprehensive aggregates of all receipts from all business in all of the states is utilized, or necessary,—hence no involved formula is required. This conclusion follows for two reasons:

I. The tax as applied to non-residents seeks to tax ONLY that portion of their income attributable to transacting business within Indiana,

Sec. 2, Chap. 50, Indiana Acts 1933, p. 388 at p. 390;

Miles et al. v. *Department of Treasury* (1935), 209 Ind. 172 at 188, 199 N. E. 372 at 378-379,

so that any receipts representing business activities outside of Indiana should be eliminated by statutory command.

II. Where words of general or broad import are used in a statute, the court will, by restrictive interpretation, construe them to apply only to cases clearly within the field of legislative control.

Japanese Immigrant Case, 189 U. S. 86, 101, 23 S. Ct. 611;

U. S. v. *Coombs,* 12 Pet. 72, 76, 9 L. ed. 1004;

Albany Co. v. *Stanley,* 105, U. S. 305, 26 L. ed. 1044.

Similarly, when a statute is broad enough to cover matters without the state, as well as within, and as applied to matters without the state it would be unconstitutional, the court may restrict its application to matters within the jurisdiction of the state.

Singer Sewing Machine Co. v. *Breckell,* 233 U. S. 304, 34 S. Ct. 493;

State v. *Peet,* 80 Vt. 449, 68 Atl. 661, 130 A. S. R. 998;

State v. *Clement National Bank*, 84 Vt. 167, 78 Atl. 944.

B. The petitioners were not required to bear the primary burden of proof with reference to the apportionment of income achieved by the application of the Indiana Act.

It is respectfully submitted that the statement contained in the majority opinion:

> "Nor do we think, as argued, that the burden is upon the taxpayer to make an apportionment. It would seem more reasonable to think that it is incumbent upon the state which seeks to impose the tax, to provide a method of determining that portion of the income derived from transactions occurring within the state,"

misconceives the nature of Section 2 of the taxing act, which provides that only the income derived from Indiana business or sources is to be used as the measure of the tax, but, more than that, it misconceives the nature of this action. It is important, then, to note that prior to the institution of this action the taxpayer had been granted a hearing before an administrative board, as provided by the statute, and that this board had determined that the amount used as the measure herein was derived from business activities carried on within the State of Indiana. The respondent then paid the tax and instituted this action seeking a refund, claiming in part that the determinations of the assessing authorities were erroneous. But the respondent did not offer any evidence to show what, if any, amount used as a measure of this tax was not properly allocated to Indiana business sources.

The majority opinion seems to indicate that the primary burden of proof is to be recognized as being upon the petitioners and not upon the respondent. We cannot agree with this. There would appear to be no reason why the

usual rules with reference to the burden of proof in civil cases should be abrogated in a case seeking the refund of taxes paid.

Nor do we believe that the decision of the United States Supreme Court in *Hans Rees' Sons* v. *North Carolina*, 283 U. S. 123, cited in the majority opinion, sustains such a view. Conrariwise, the language of the Court appears to recognize that in the cases of *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, and *Bass, Ratcliff and Gretton, Ltd.* v. *State Tax Commission*, 266 U. S. 271, the taxpayers failed in their attempts to invalidate the apportionment methods used for the reason that they did not offer proof that the application of the statutory method of apportionment had produced an unreasonable result. The Court then proceeds to point out that the *Hans Rees' Sons* case differs from the *Underwood* and *Bass* cases because the evidence which was lacking in the latter cases was present in the *Hans Rees' Sons* case, as witness the language of the Court at pp. 132 and 133:

> "We are unable to agree with this view. *Evidence which was found to be lacking in the Underwood and Bass cases is present here.* These decisions are not authority for the conclusion that where a corporation manufactures in one State and sells in another, the net profits of the entire transaction, as a unitary enterprise, may be attributed, regardless of evidence, to either State. In the *Underwood* case, it was not decided that the entire net profits of the total business were to be allocated to Connecticut because that was the place of manufacture, or, in the *Bass* case, that the entire net profits were to be allocated to New York because that was the place where sales were made. In both instances, a method of apportionment was involved which, as was said in the *Underwood* case, '*for all that appears in the*

> *record,* reached, and was meant to reach, only the profits earned within the State.' The difficulty with the evidence offered in the *Underwood* case was that it failed to establish that the amount of net income with which the corporation was charged in Connecticut under the method adopted was not reasonably attributable to the processes conducted within the borders of that State; and in the *Bass* case the Court found a similar defect in proof with respect to the transactions in New York." (Our italics.)

It is both significant and important that the respondent did not introduce evidence proving (or even attempting to prove) what part, if any, of the purchase price of the raw cross-ties was derived from sources outside of the State of Indiana. Yet it is essential that one attacking the constitutionality of a taxing act upon the thesis that it taxes income properly ascribed to income-producing activities carried on in other states, affirmatively establish the amount of income which is properly taxable in the sister state.

Underwood Typewriter Co. v. *Chamberlain* (1920), 254 U. S. 113 at 120, 121;

Bass, Ratcliff and Gretton, Ltd. v. *State Tax Commission* (1924), 266 U. S. 271 at 280-283.

There is not a scintilla of evidence in this Record establishing the proportion of respondent's income attributable to any state other than Indiana. The respondent (plaintiff below) did not even attempt to produce any evidence establishing what the apportionment it demands, if any, should be. Since the burden of proof was definitely upon the respondent to establish the amount or the proportion of its income attributable to Indiana and to each of the other states, the present state of the Record means 100% of the respondent's gross income here involved is attributable to its Indiana business.

Before leaving this branch of the discussion, we desire to call attention to one or two omissions appearing in the statement of the evidence in the majority opinion which may have some bearing upon the due process phase of the case. In the opinion, (R. 71) in referring to the respondent it is stated that the respondent "maintained no office in Indiana, but was qualified to do business in that state where it had a statutory agent for service of process"; but the opinion omitted to state, as appears from page 48 of the Record, that:

> "In addition to the agent maintained by plaintiff in the City of Indianapolis, Indiana, for the service of process, plaintiff during the years 1934, 1935 and 1936 normally had one agent or employee assigned to the Indiana territory who was engaged in the buying of ties and was responsible to the Marietta, Ohio, office."

Likewise there is omitted the further statement appearing on page 48 of the Record that:

> "Plaintiff's district manager of production and operation, with headquarters at plaintiff's Marietta, Ohio, office, made periodical trips to Indiana during said years to interview people with whom plaintiff did business in relation to complaints, giving them assistance, and other matters that were beyond the authority of the normal field man's scope."
>
> F. 11, R. p. 48.

Beginning with the last sentence on page 71 of the Record the majority opinion states as follows:

> "In response to this price circular the producers would notify plaintiff at its Marietta office by mail, telephone or telegraph of the quantity, type and quality of the ties they could furnish, as well as the nearest loading point."

Reference to page 44 of the Record we think shows that there should have been added the statement:

> "or plaintiff's agent would make such arrangement with producers in *Indiana.*"

C. The measure of the tax was derived in its entirety from an Indiana source, therefore, there was nothing to apportion.

The majority opinion states:

> "We have stated heretofore the facts concerning the transactions constituting the source of income and shall not repeat. It is sufficient to point out that a sizable portion of the business affording the source of income, was transacted outside the State of Indiana, both before and subsequent to the actual delivery of the ties to the railroad."

The majority opinion cites the decision in *Hans Rees' Sons* v. *North Carolina,* 283 U. S. 123 at 133. Reference to that authority indicates that the activities forming the basis of that allocation were revenue-producing activities exclusively. No expense items, or non-revenue producing activities, were mentioned or considered by the Court. This is precisely the rule for which the petitioners contend in this case: i.e., that the allocation of income is to be based upon the basis of activities which are revenue-producing in nature. All of the revenue-producing activities of the respondent in connection with the respondent's sale and delivery in Indiana of the ties to the Railroad took place in Indiana. Under such circumstances there was nothing to apportion.

It is submitted that the Circuit Court of Appeals in its majority opinion erred in holding and deciding that the income involved was not derived wholly from sources within the State of Indiana; that said Court erred in

holding and deciding that there was no provision in the Act for allocating the tax to the income derived from that part of the business transacted in Indiana, it appearing clearly that the Act itself furnishes a perfect allocation in that the measure used is limited to income of non-residents derived from business and/or sources in the State of Indiana; and finally that said Court erred in holding and deciding that the burden was upon the petitioners to produce evidence that no income was used as a measure except such as was derived from business activities or sources within Indiana.

Four

The Commerce Was Not Interstate and the Tax Is Valid

Two written contracts were introduced in evidence and appear as part of the findings. They may, for brevity of expression, be called the Central Creosoting Company contract and the Joyce-Watkins Company contract. The Joyce-Watkins Company contract is the only one of the two which contained any provision with reference to the sale and purchase of railroad cross-ties. It is not contended that this contract was executed in the State of Indiana, but it is contended that this contract as respects the sale and purchase of cross-ties is in the nature of an option and that the resulting contract of sale involving a transfer of property from vendor to vendee actually took place in the State of Indiana.

Reliance apparently is placed on the statement on page 29, lines 14 to 22, of the Record embraced in the findings to the effect that: "All ties supplied to the railroad company have been supplied under that contract," referring

to the Joyce-Watkins contract, but that does not suffice to show that the actual sale and transfer of property in the goods did not occur in the State of Indiana. The option granted in the Joyce-Watkins contract was, in effect, no more than an offer which did not actually culminate in a sale until after the cross-ties had been selected and accepted by the Railroad Company on its right-of-way in the State of Indiana. The goods were unascertained until the railroad inspector inspected them and selected them. Note the following from page 44 of the Record:

> "When the ties were ready at a loading point, an inspector of the plaintiff and of the Baltimore & Ohio Railroad Company would go to the loading point, and all ties accepted by the Railroad Company's inspector were loaded by the producer on cars of the Railroad. Ties rejected by the Railroad inspector were not loaded on cars or paid for by plaintiff."

In other words, title to rejected ties never passed from the producer to the respondent but title to those which were accepted by the Railroad Company did pass to the respondent in Indiana and thereupon immediately passed to the Railroad Company as a result of their selection and acceptance by its inspector. Under the Uniform Sales Act of the State of Indiana which has been in force since 1929,

> "Where there is a contract to sell unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained,"

with certain exceptions not material here.

> Burns' Indiana Statutes Annotated, 1933, Sec. 58-201.

To further emphasize the fact that the Joyce-Watkins contract was no more than an option, so far as the sale of cross-ties is concerned, note the following language, quoting from page 25 of the Record:

> "The Contractor agrees to sell to the Railroad all ties produced or purchased by it originating in territory from which ties in the usual course of business would be brought to the lines of the Railroad *to the extent that the Railroad may give orders to the Contractor for the purchase of such ties.*" (Our italics.)

But there was nothing in the contract which required the Railroad to order a single cross-tie from the contractor, as is clearly evidenced by the following language, quoting from page 26 of the Record, *viz:*

> "This contract shall not limit the right of the Railroad to purchase ties produced in territory adjacent to its lines or elsewhere *from others, nor require the Railroad to order ties from the Contractor except to the extent that it may see proper to do so.*" (Our italics.)

It should be noted, too, that the Contractor is not required to furnish ties to the Railroad except when the Contractor has produced or purchased ties originating in the territory from which in the usual course of business they would be brought to the lines of the Railroad.

In other words, under the Joyce-Watkins contract the Railroad Company had the right to order ties or *not* to order ties as suited its purpose, or even its whim and fancy, and so long as the Contractor did not produce or purchase ties in the designated territory, it had a similar right. The Record shows that when orders were made the respondent *acknowledged* same by its agents at Marietta, Ohio, and proceeded to buy cross-ties in the State of Indiana for the

purpose of filling the order. This was followed by an offer to sell to the respondent by producers in Indiana who made that offer by transporting the ties to the Railroad Company's right-of-way in Indiana where the purchase was made by the respondent and where the sale ultimately was made by the respondent to the Railroad Company. It is clear that the cross-ties were all produced within the State of Indiana and never left the State of Indiana until they were bought by The Wood Preserving Corporation in Indiana; (that is, The Wood Preserving Corporation received title in Indiana) and were again sold by The Wood Preserving Corporation in Indiana to the Railroad Company, which received title and took delivery in Indiana. No interstate commerce is involved in such a transaction. *The contract did not require interstate shipment of the ties, or any shipment whatsoever.*

Reliance apparently is placed upon that part of the Joyce-Watkins contract found at the top of page 23 of the Record, where the following language is used:

> "The Railroad agrees to deliver to the Contractor on cars at the Treating plant the ties and other forest products which it *desires* to have treated." (Our italics.)

Attention is called to the word "desires." It will be observed that the Joyce-Watkins contract deals with the subject of *treating* raw ties as well as with purchase and sale. The above language, however, is far from requiring the treatment of all ties bought by the Railroad Company. It simply provides that all ties which the Railroad Company *desires* to have the respondent treat are to be delivered to the plant by the Railroad Company rather than by the respondent. But such a transportation by the Railroad

Company of its own property for treatment by the National Lumber and Creosoting Co., was not interstate commerce. The transportation in such a case is separate and distinct from the sale which has been fully consummated by the passage of title and delivery to the Railroad Company on its own cars, on its own right-of-way in the State of Indiana. *The case is wholly unlike the case where the ultimate destination of the product as the goods of the buyer required delivery to the buyer across state lines. Here the delivery to the Railroad Company had been completed in Indiana, and the only shipment across state lines was for the purpose of having a service applied to the products already fully owned by the Railroad Company; and even that shipment was wholly under the control of the Railroad Company. There was no requirement created either by the contract, the character of the goods purchased, or the character of the purchaser that the ties be transported.*

The majority opinion seems to proceed upon the theory that there was an agreement supplemental to the two written contracts already referred to embodied in oral directions to the respondent that all ties originating at points on the railroad west of the Ohio River (including Indiana) should be shipped by respondent to Finney, Ohio. This, of course, was not a modification of the written contracts, and was not a contract at all, but is significant of the two positions which petitioners have taken, namely, that the railroad company had the right at any time to change the destination of the raw ties which were being shipped for treatment, and also that the only shipment across state lines was by the railroad company owner for the purpose of such treatment and not by the respondent, the extraordinary bill of lading to the contrary notwithstanding.

Under the facts in this case the place where title passes is important.

The form of the bill of lading, much like that in the case of *Superior Oil Company* v. *Mississippi*, 280 U. S. 390, is not sufficient to make an interstate transaction of on which is purely intrastate. As already pointed out, title to the raw ties in this case passed to the Railroad Company in the State of Indiana, a fact which can not be erased by the form of the billing used. In this connection, we desire to discuss the case of *Superior Oil Company* v. *Mississippi*, 280 U. S. 390, a case which we think the majority opinion fails to adequately appraise. In this case— i. e., the *Superior Oil Company* case—the oil company was a corporation created and doing business in Mississippi. It sold gasoline to packers in Biloxi, Mississippi, and delivered it to the packers' wharves in that state. The majority opinion seems to concede that the transaction was completed by this act of delivery notwithstanding the use of a bill of lading showing that the goods were to be transported and delivered to the packers at a point in Louisiana across state lines. This, in fact, is what the court held in the *Superior Oil Company* case, and we see no reason why the same reasoning should not apply to the present case. An examination of the case discloses that in the *Superior Oil Company* case a bill of lading was used very much like what is used in the present case, which recited that the oil was consigned to Gussie Fontaine Packing Company at Grant's Pass, Louisiana, via its own boat, Frank Louis, with the protective provision that the property remained the property of the oil company until it was delivered to the Gussie Fontaine Packing Company at Grant's Pass, Louisiana.

In the *Superior Oil Company* case the Court brushed this paper transaction aside with the statement, quoting from pages 394 and 395:

> "The document hardly can affect the case, because it is 'not within the power of the parties by the form of their contract to convert what was exclusively a local business, subject to state control, into an interstate commerce business protected by the commerce clause'."

In other words, by the form of the bill of lading the parties sought to "build up" the theory of a delivery to the Packing Companies at Grant's Pass, Louisiana, thus requiring shipment across state lines, whereas in fact delivery had already been made at Biloxi, Mississippi.

How like the present case the *Superior Oil Company* case is. The Railroad Company received title in Indiana. It was at liberty to do what it pleased with the ties when so received, but whether it was or not, the subsequent transportation was in order that an additional service should be applied to the ties in the treating process. Clearly the shipment by the owner of goods across state lines for the purpose of having someone other than the owner render an additional service does not constitute interstate commerce. Of course the transportation itself was interstate, but the element of "interstate commerce" as between the seller and the buyer is wholly lacking.

In this connection, we think the Court in the majority opinion has misinterpreted the time sequence in stating that, "Here there is not even a suspicion of an effort to avoid taxation. In fact the same course of business had been followed by the parties continuously since a period

prior to the enactment of the Act in question." The proper chronology is:

1. The Act was approved on February 27, 1933. Chapter 50, Indiana Acts of 1933, p. 388.
2. The date for the taking effect of the assessment feature of the Act was May 1, 1933.
3. The Joyce-Watkins contract was assigned to the respondent on May [illegible], 1933 (R. 29).

The fact that the title to the cross-ties passed in the State of Indiana and that at the same time delivery was made to the Railroad Company on its cars in the State of Indiana, is significant because it shows that the sale by the respondent and purchase by the Railroad Company was completed in the State of Indiana.

In our further amplification of the above proposition we desire to call the attention of the Court to the fact that the delivery by the Railroad Company of the cross-ties at Finney, Ohio, was to the Creosoting Company's plant for the purpose of having the creosoting process applied. It was not the case, therefore, where ultimate delivery and passage of title to the Railroad Company was to take place in another state. The delivery and passing of title to the Railroad Company as well as physical possession had taken place already in the State of Indiana. *The only delivery which took place in Finney, Ohio, was the delivery by the Railroad to the Creosoting Company.* In this particular the case is entirely different from the *Dahnke-Walker Co.* v. *Bondurant* case and other similar cases where, notwithstanding delivery to a common carrier f. o. b. point of origin, such delivery is not conclusive on the question of whether the commerce is intrastate or interstate where it was contemplated by the parties that ultimate delivery *to*

the purchaser was to be made in another State. In the above case the plaintiff purchased grain in Kentucky for shipment *to its mill in Tennessee.* The Court looked beyond the initial delivery to the common carrier in Kentucky and found that the ultimate destination and delivery from the very first was the *plaintiff's mill in Tennessee.* The transaction there was held to be interstate commerce because the sale and purchase was not completed in Kentucky but actually involved a transportation of the property to the plaintiff *at its mill in Tennessee.*

In this case, even upon respondent's theory, it cannot be contended that ultimate delivery to the Railroad Company, the purchaser, was to be made at Finney, Ohio, or was in contemplation by the parties. *As a matter of fact, no delivery was made to the Railroad Company at Finney, Ohio, until after the treating was done and then a redelivery took place.* Delivery to it had been completed in Indiana from whence in its own cars, on its own right-of-way, it transported its own property to the Ohio plant for the creosoting treatment by the Creosoting Company, limited only to the stock "which it desires to have treated." It is important, therefore, that the title passed in the State of Indiana at which point the ties were loaded upon the Railroad Company's cars and at which point the Railroad Company received physical delivery.

The rule defining the limits of state taxation is not necessarily the same as where regulation alone is the object.

The majority opinion seems to hold the contrary. Since, however, the Supreme Court of the United States has so repeatedly indicated a different conclusion, we are constrained to point out again what the Supreme Court has said in the case of *Swift & Company v. United States,* 196

U. S. 375, and *Stafford* v. *Wallace*, 257 U. S. 495. In the first of these cases the Supreme Court said, quoting from page 400:

> "Moreover, the sales are by persons in one State to persons in another. But we do not mean to imply that the rule which marks the point at which state taxation or regulation becomes permissible necessarily is beyond the scope of interference by Congress in cases where such interference is deemed necessary for the protection of commerce among the States."

In the second case, quoting from page 525, the Supreme Court used the following language:

> "The other cases relied on by appellants are less relevant to this discussion than the *Anderson* and *Hopkins Cases*. *Some of them are tax cases.* As to them it is well to bear in mind the words of the court in the Swift Case (p. 400):
>
> "'But we do not mean to imply that the rule which marks the point at which state taxation or regulation becomes permissible necessarily is beyond the scope of interference by Congress in cases where such interference is deemed necessary for the protection of commerce among the States.'" (Our italics.)

Clearly the Supreme Court intends to imply that there is a difference between *regulatory* cases and *tax* cases, and that where *regulation* is the objective it may extend to transactions which, considered alone, are intrastate but when considered in their relation to other transactions they become interstate. On the other hand, the thought is that where *taxation* of some activity is the object, the taxation of activities which are purely *intrastate* will not be interfered with upon the basis of the commerce clause merely because, when considered in its relation to other trans-

actions, it might perchance be regarded as a step in a plan which is subject to *regulation*. Nor does the case of *Minnesota* v. *Blasius*, 290 U. S. 1, cited in the majority opinion, hold otherwise. It is quite true that the Court in its opinion in that case does not refer to the distinction; but more important than what the Court omitted to say is what the Court actually did. What the Court did, undoubtedly, was to give recognition to the difference by sustaining the tax.

Moreover, a transaction may be interstate commerce or intrastate commerce depending upon the person involved, as was said by the Court in the case of *United States* v. *Sutherland*, 9 Fed. Sup. 204 at page 207:

> "When a lumber merchant or any other type of merchant or one not a merchant sells a thing in the state of Missouri to a resident of Missouri, that transaction certainly is altogether intrastate. If the person to whom he sells is a resident of Iowa and will take the thing purchased to Iowa, the transaction between the vendor and vendee still is altogether intrastate. The transaction is completed when the sale is made. What the purchaser does with the thing bought certainly cannot affect the nature of the transaction between him and the seller. The purchaser indeed is engaged in interstate Commerce if he transports the thing bought to another state, but the seller is not. It is impossible to elaborate a truth so simple."

We think it is abundantly shown in this case that the measure of the tax is derived solely from an intrastate activity, and that the levy, using that basis, is valid.

On the grounds stated in the petition, and for the reasons more fully stated in the brief, it is respectfully

submitted that the decision of the United States Circuit Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted,

GEORGE N. BEAMER,
Attorney General of Indiana,

JOSEPH W. HUTCHINSON,
Deputy Attorney General,

JOSEPH P. MCNAMARA,
Deputy Attorney General,
Counsel for Petitioners.

APPENDIX

Pertinent provisions from the taxing act involved:

Section 2 of Chapter 50 of the Acts of 1933:

"Sec. 2. There is hereby imposed a tax, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the entire gross income of all residents of the State of Indiana, and upon the gross income derived from sources within the State of Indiana, of all persons and/or companies, including banks, who are not residents of the State of Indiana, but are engaged in business in this state, or who derive gross income from sources within this state, and shall be in addition to all other taxes now or hereafter imposed with respect to particular occupations and/or activities. Said tax shall apply to, and shall be levied and collected upon, all gross incomes received on or after the first day of May, 1933, with such exceptions and limitations as may be hereinafter provided."

Section 6 (a) of Chapter 50 of the Acts of 1933:

"Sec. 6. There shall be excepted from the gross income taxable under this act:

"(a) So much of such gross income as is derived from business conducted in commerce between this state and other states of the United States, or between this state and foreign countries, to the extent to which the State of Indiana is prohibited from taxing under the Constitution of the United States of America. There shall also be excepted from such gross income, salaries, pensions, and other emoluments paid by the United States of America or any of its agencies, and interest or other earnings paid upon bonds or other securities issued by the United States of America

or its agencies, to the extent that the State of Indiana is prohibited from imposing a tax upon such salaries, pensions, emoluments, interest and/or earnings, by the Constitution of the United States of America."

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No. 654

Supreme Court, U.S.
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IN THE

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OCTOBER TERM, 1940

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Petitioners,

v.

THE WOOD PRESERVING CORPORATION,

Respondent.

ON CERTIORARI FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONER'S ADDITIONAL AUTHORITY

GEORGE N. BEAMER,
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Deputy Attorney General,

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PETITIONER'S ADDITIONAL AUTHORITY

I

The petitioner as an additional authority to the "Brief of the Petitioners" heretofore filed herein respectfully submits the following additional authority to be placed immediately after the ninth line on page 9 of said brief,

and after the eighth line on page 12, and after the twelfth line on page 28 of said brief:

Section 9 (a), Chapter 50, Indiana Acts of 1933, page 388 at page 395:: 11 Burns Indiana Statutes Annotated, 1933 Ed., 64-2609 (a):: Baldwin's Indiana Statutes, 1934, Ed. 10989 (a).

(See Appendix on next page.)

Respectfully submitted,

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The Attorney General of Indiana,

JOSEPH W. HUTCHINSON,
Deputy Attorney General,

JOSEPH P. MCNAMARA,
Deputy Attorney General.
Counsel for Petitioners.

APPENDIX

Section 9 (a) of Chapter 50 of the Indiana Acts of 1933, page 388 at pages 394 and 395, reads as follows:

"Sec. 9 (a). The taxes levied hereunder shall be due and payable in quarterly installments, on or before the fifteenth day of January, April, July and October in each year, for the period ending on the last day of the preceding month. The taxpayer shall, on or before the fifteenth day of such months, make out a return, in the form required by subsection (c) of this section, showing the amount of the tax for which he is liable, for the preceding quarter, and shall mail the same, together with a remittance for the amount of the tax, to the office of the Department of Treasury. Such quarterly return shall be signed by the taxpayer or a duly authorized agent of the taxpayer, and shall be verified by oath; *Provided, however, That any non-resident taxpayer who is not liable for a tax upon his entire gross income, by reason of such non-residence, as provided in this Act, shall state in his return his entire gross income, but shall also show what part of such gross income is derived from sources within the State of Indiana and taxable hereunder. Such apportionment of gross income between sources within and without the State of Indiana shall be subject to review by the Department of Treasury, as hereinafter provided.*"

(Italics added by Petitioner.)

Section 9 (a), Chapter 50, Indiana Acts of 1933 at pp. 394-395:: 11 Burns Indiana Statutes Annotated, 1933 Ed., 64-2609 (a):: Baldwin's Indiana Statutes, 1934 Ed., 15989 (a).

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Respondent.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONERS' RESPONSE TO RESPONDENT'S ADDITIONAL AUTHORITIES

Filed April 2, 1941.

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Respondent.

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PETITIONERS' RESPONSE TO RESPONDENT'S ADDITIONAL AUTHORITIES

Filed April 2, 1941.

As an answer to the "Respondent's Additional Authorities" filed on April 2, 1941, the petitioners respectfully submit the following:

1. The case, *Department of Treasury* v. *Crowder* (1936), 214 Ind. 252 (cited by respondent under the para-

graph designated as "1"), has been overruled by the Indiana Supreme Court in *Department of Treasury of Indiana* v. *Muessel* (March 18, 1941), 32 N. E. (2d) 596. The *Crowder* decision cited by the respondent refers with approval (214 Ind. at 256) to the leading case of *Miles* v. *Department of Treasury* (1935), 209 Ind. 172, 199 N. E. 372, 101 A. L. R. 1359, wherein the nature of the Indiana Gross Income Tax Act was before the Indiana Supreme Court. This precise question of the opportunity or benefit which was the subject-matter of the tax was not before the Indiana Supreme Court in the *Crowder* case and that court was not deciding that issue in the *Crowder* decision—but the issue had previously been determined in the *Miles* case, where the following significant language was utilized:

> *"We conclude that the tax in question is an excise, levied upon those domiciled within the state or who derive income from sources within the state, upon* the basis of the privilege of *domicile or the privilege of transacting business within the state,* and that the burden may reasonably be measured by the amount of income. The reasoning which justifies a tax upon the basis of domicile as readily supports and justifies a tax upon the basis of the right to receive income within, or transact business under the protection of, the state. We feel that the weight of reason and authority sustains this view." (209 Ind. 172, at 188.)

2. In response to the paragraph designated as "2" of "Respondent's Additional Authorities": At the time of the oral argument respondent's counsel indicated that the extensive amendments contained in Chapter 117 of the Acts of 1937 had been made subsequent to the *Adams* decision. As a matter of fact, Chapter 117 of the Indiana

Acts of 1937 was approved March 9, 1937, whereas this court handed down its decision in *J. D. Adams Manufacturing Company* v. *Storen* on May 16, 1938—over a year later.

It is true that Chapter 140 of the Indiana Acts of 1941, which will become effective on January 1, 1942, did embrace a few changes in the Indiana Gross Income Tax Act, and that the title was not amended in the 1941 session. However, this is not a sufficient basis for the unsupported statement of the respondent that:

> "* * * and must, therefore, have confirmed the construction of this court in the Adams case."

First, it should be noted that the sufficiency of the title of the Act was not before this court in the *Adams* case.

Second, counsel for respondent ignores the fact that the term "received," a modification of which is used in the title of this Act, is a broad, generic term which embraces within its concept the more limited, specific term, "derived." Respondent objects because the Act in taxing non-residents does not use the word "receive," but imposes the tax "upon the gross income *derived from sources within Indiana.*" Reference to Webster's New International Dictionary, (2d) Ed., Unabridged, (Merriam, 1934) indicates that the word "derived" means:

> "To receive, as from a source or origin."

From this accepted standard dictionary definition, it is at once apparent that whether the word "received" or the word "derived" is utilized by the draftsmen of the Act in its title is of little importance, since the net result would be the same, and that the more prudent course to follow would be to use the broad, generic term, i.e., the word "receive" and thus avoid controversy. *Third*, the

statement erroneously assumes that this court in the *Adams* decision (304 U. S. 307) did not recognize that the opportunity forming the subject-matter of the tax as applied to non-residents was the deriving of gross income from sources within Indiana. The contrary is true. See: 304 U. S. 307 at 308 and 310—also dissent at 316.

The fact that the Indiana Legislature did not amend the title to the Act after the *Adams* decision can mean but one thing: That the Legislature was confident that the provisions of section (2) which are tailored to fit the situation of non-residents and which specifically limit the tax imposed upon non-residents to the deriving of "gross income from sources within this state," were adequately within the title of the Act. Had the title been amended, *then* the respondent might have been able to argue that the Indiana General Assembly interpreted the title as not being broad and generic enough to include the more specific provisions relating to non-residents. But the fact that the title was *not* amended indicates that the General Assembly of Indiana felt confident that the title was broad enough. Also respondent appears to be oblivious to the fact that the objection that the title of the Act is defective within the meaning of Section 19 of Article IV of the Indiana Constitution (1851) is not available to respondent since the objection was not pleaded. It cannot be resorted to as an aid in statutory construction since Sections 2 and 9 (a) of the Indiana Gross Income Tax Act of 1933 are so clear and unambiguous as to preclude the resorting to any aid to statutory construction.

(Incidentally, the title of the Act was assailed under the Indiana Constitution in the case of *Miles, et al.* v. *Department of Treasury* (1935), 209 Ind. 172—and although the Indiana Supreme Court in that case concluded:

> "that the tax in question is an excise, levied upon those * * * who derive income from sources within the state, upon * * * the privilege of transacting business within the state * * *."

the court did not feel constrained to hold or to observe that the Act in its application to non-residents was invalid as being beyond the purview of the title to the Act.)

3. Respondent adroitly presents a fragment of the letter in that part of its "Additional Authorities" identified as "3." The entire letter indicates that the problem under consideration was diametrically different from the problem presented in this cause of action. There the director was writing with reference to whether bare delivery from a point outside of Indiana into the state, standing alone and by itself, was sufficient to permit the state to tax a non-resident not doing business within the state measured by the income derived from the sale resulting in such a naked delivery. In this case we are dealing with a factual situation wherein (1) respondent was admitted to do business in Indiana and normally had one agent there; (2) respondent's agent made arrangements in Indiana with producers there to acquire ties, later sold to the railroad; (3) the respondent acquired the property in Indiana; (4) the contract of sale was entered into within Indiana; (5) the delivery was made to the purchaser within the State of Indiana; and (6) after delivery at a point in Indiana nothing remained to be done with reference to the sales transaction by the respondent beyond the territorial boundaries of the State of Indiana. It should also be noticed that the quotation, a part of which respondent has isolated and presented as an additional authority, is not a quotation from the Act itself, nor is it a quotation from an official regulation, nor from

a rule, nor an administrative ruling or a decision. It is from a letter having to do with a hypothetical situation which was *not* similar to the situation in this cause. The entire letter reads as follows:

> "We advise that while Indiana was represented on the Committee which drafted the uniform regulation on interstate commerce, it was not adopted by this state.
>
> "Eventually this regulation or one similar may by adopted.
>
> "We did not choose to adopt the present regulation which is based on the McGoldrick decisions until the theory promulgated has been subjected to further test. We understand that both Illinois and Missouri are involved in litigation at the present time with respect to this regulation. We are also of the opinion that the *Sears, Roebuck & Company* case in Iowa may reveal to a great extent the power of a state to tax incoming shipments.
>
> "Under the Indiana Gross Income Tax Act we doubt if taxation can be predicated on mere delivery in the state and hence we attempt to tax foreign corporations on sales made *into* Indiana only when they are licensed in Indiana and maintain substantial offices or establishments in the state which are responsible for the sales being made.
>
> "We do, however, attempt to tax incoming shipments in cases where the out-of-state firm has facilities within Indiana for filling orders. At the present time this question is being tested by the International Harvester Company and the Ford Motor Company."

4. The respondent attempts to escape the plain, undisputed provisions of Section 9 (a) of Chapter 50 of the Indiana Acts of 1933 by stating

"No reporting was ever required under this Section by Regulation 190."

(1) Regulation 190 did not deal (nor purport to deal) with income derived from a source outside of the State of Indiana except as such income might be a component and integral part of commerce between the states. (2) A section of the statute cannot be repealed by an administrative regulation—but it is important to note that Regulation 190 does not attempt to repeal or to alter Section 9 (a) or Section 2 of the Taxing Act, both of which relate (insofar as non-residents are concerned) to income derived from sources within the State of Indiana and income derived from sources outside the State of Indiana. Respondent contends that the tax is invalid because its measure was derived from sources outside of the State of Indiana, thereby violating the Fourteenth Amendment to the Constitution of the United States of America. Consequently, since Regulation 190 in no wise affects the respondent's duty to make the separation or apportionment provided for in Section 2 and in Section 9 (a) of Chapter 50 of the Acts of 1933, any reference to Regulation 190 is fruitless.

Respondent's reference to Regulation 193 overlooks the fact that that Regulation is expressly limited in its application *to residents* of the State of Indiana. Respondent was a *non-resident*. It therefore was governed by the clear and plain provisions of Section 9 (a) of the Taxing Act.

The last literary paragraph of respondent's "Additional Authorities" contains the following unsupported statement:

"(c) The apportionment provision was never applied by the officials and was repealed in 1937."

It is true that a part of Section 9 (a) was omitted in the amendments adopted in 1937; however it is extremely important to note that all of the taxes here involved were assessed for taxing periods *prior* to 1937; and that, consequently, the respondent should not be permitted to avail itself of any statutory change occurring subsequent to the pertinent taxing periods. But the important thing to note is that respondent's statement that the "apportionment provision was never applied by the officials" is *not* supported by the evidence, by the findings, by the record, nor can it be supported by any official regulation adopted by the Department of Treasury of Indiana, nor in any other manner. It is a gratuitous statement wholly outside of the Record and unsupported by it.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1940

No. 654

Department of Treasury of the State of Indiana, M. Clifford Townsend, Peter F. Hein, Lawrence F. Sullivan, as and constituting the Board of Department of Treasury of the State of Indiana,
Petitioners,

vs.

The Wood Preserving Corporation,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Supreme Court of the United States

October Term, 1940

No. 654

Department of Treasury of the State of Indiana, M. Clifford Townsend, Peter F. Hein, Lawrence F. Sullivan, as and constituting the Board of Department of Treasury of the State of Indiana,
Petitioners,

vs.

The Wood Preserving Corporation,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

Opinion Below

The opinion of the Circuit Court of Appeals (R. 70-82) is reported in 114 F. (2d) 922.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered July 20, 1940 (R. 83). A petition for rehearing was filed August 2, 1940, and was denied October 5,

1940 (R. 84). The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. A. Sec. 347.

Questions Presented

The statement of "Contested Issues" in the petition (pp. 2-3) does not correctly present the questions here involved. It is based upon inferences of fact not justified by the findings and is argumentative. The questions presented, as found by the Circuit Court of Appeals (R. 73; 114 F. (2d) 922, 924-925), are correctly stated thus:

1. Whether the gross income taxes herein sought to be recovered are invalid as in violation of the due process clause of the 14th Amendment to the Federal Constitution, because laid upon a taxable event—the receipt of gross income—which occurred outside the territorial limits of Indiana and beyond the jurisdiction of the taxing authorities.

2. Whether the gross income taxes herein sought to be recovered are invalid as in violation of the due process clause of the 14th Amendment to the Federal Constitution, because laid without allocation or apportionment upon business activities both without and within the territorial limits of Indiana and, as to activities outside the state, beyond the jurisdiction of the taxing authorities.

3. Whether the gross income taxes herein sought to be recovered are invalid as in violation of the commerce clause, Article I, Section 8, of the Federal Con-

stitution, because laid upon receipts derived from interstate commerce, constitute a direct burden upon such commerce and are of a type which subjects the commerce to the risk of multiple taxation of like kind in other states.

Each of said questions presents a separate and distinct issue, entirely independent of the others. The Circuit Court of Appeals considered each question separately, and decided each in favor of respondent.

Title, Statute and Regulations

The title of the Indiana Gross Income Tax Act, and the pertinent provisions of the Act and regulations, are printed in the Appendix, *infra*, pp. 80-83. It was agreed in the stipulation, and carried into the findings, that material official regulations "may be judicially noticed by the Court" (F. 10, R. 48).*

Statement

The Circuit Court of Appeals in its opinion made an entirely accurate resume of the facts as stipulated by the parties and found by the District Court (R. 70-72). The statement of "The Facts" in the petition (pp. 3-8) is not correct. There are important omissions and inaccuracies which result in presenting a case quite different from that set forth in the findings of the District Court and decided by the Circuit Court

*NOTE—References in parentheses are to the findings of fact by number and to the record by page. Where used herein, F.—findings; R.—record; p.—page; l.—line; and RR—B. & O. Railroad.

of Appeals. Respondent deems it necessary to correct this, and for that purpose submits the following summary of the facts, as stipulated and found by the District Court (R. 20-58), with two parenthetical comments thereon by way of explanation:

Complete Condensed Statement of Facts

a. Respondent is a Delaware corporation, principal office at Pittsburgh, Pa. Branch office at Marietta, Ohio, from which its sale of ties is operated. Qualified to do business in Indiana, but maintains no office and has no property there. Has a designated agent in Indianapolis for service of process only. Has no regular agent or employee operating in the state, or residing there. Occasionally sends an agent into the state in connection with its tie business, who travels from, and reports to, the Marietta office. (R. 20, ll. 24-31; R. 48, ll. 16-22, and ll. 28-40.)

Respondent is engaged in the preservative treatment of timbers, including railroad ties (R. 20, ll. 31-33). It controls and operates two plants—one at Green Springs, W. Va.; the other at Finney, Ohio.

Respondent is also engaged in selling raw ties to railroads. (R. 20, l. 33.)

b. Respondent has two written contracts, and an oral supplemental agreement, with the B. & O. Railroad, a Maryland corporation, main office at Baltimore, Md. (R. 22, ll. 13-16.) They are:

(1) Contract with the Railroad for treatment of ties at the Finney, Ohio, plant. This is in the name of National Lumber & Creosoting Co., successor to Central Creosoting Co. (owner of the plant), and a subsidiary of and controlled by respondent. It requires the Railroad to deliver at least 600,000 ties annually to Finney for treatment. (R. 29 (c); R. 30, ll. 18-21; R. 38, ll. 10-21.)

Respondent acquired control of this contract and the plant "prior to the year 1933" * (R. 38, ll. 16-19), and thereafter was in position to enforce delivery of raw ties by the Railroad to the Finney plant.

(2) Contract for 5-year lease and operation of the Green Springs plant, owned by the Railroad. (R. 22-28.) This is called the Joyce-Watkins contract. This contract provides that:

Railroad *shall send all ties it wants treated to the Green Springs plant* (R. 23, ll. 1-3). All raw ties must be, and were, treated before use, under this contract. (R. 49, ll. 28-31.)

Respondent "*agrees to sell* to the Railroad all ties produced or purchased by it originating in territory" convenient to the Railroad's lines "to the extent that the Railroad may give orders for such ties." (R. 25, ll. 40-45.)

The Railroad *shall advise respondent* from time to time in writing *of ties needed*, when they are to be

*NOTE—All italics used in this brief are ours unless otherwise stated.

delivered and price to be paid to respondent f. o. b. cars on the Railroad's tracks. (R. 26, ll. 5-10.) Respondent "*will produce or purchase * * * the ties so ordered, and sell and deliver the same to the Railroad as ordered * * *.*" (R. 26, ll. 10-15.)

Respondent's margin of profit on ties purchased shall be as stated in the contract. (R. 26, l. 42, to R. 27, l. 6.) "All ties will be inspected by the Railroad's inspectors, *as loaded into the cars at point of origin.*" (R. 27, ll. 7-8.)

This contract respondent acquired by assignment from Joyce-Watkins Co. *on May 3, 1933.* (R. 28.)

(3) Supplemental agreement consisting of oral instructions, accepted and complied with. (R. 49, ll. 9-27.) The instructions *modified* that *provision* of Joyce-Watkins contract *requiring the Railroad to send all its raw ties for treatment to the Green Springs plant.* (R. 23, ll. 1-3.) These instructions were:

> "You will, of course, ship all ties originating at points on the B. & O. Railroad west of the Ohio River to Finney, Ohio; and ties originating east of the Ohio River to Green Springs, W. Va." (R. 49, ll. 21-24.)

c. Pursuant to Joyce-Watkins contract, the ties were furnished on requisition orders of Railroad from time to time. (R. 26, ll. 5-10.)

These orders were made from the Railroad's *Baltimore, Md., office* to respondent's *Marietta, Ohio, office* (R. 38, ll. 27-31), and *were acknowledged from the latter office.* (R. 38, ll. 32-35.)

(This closed the sale as to each batch of ties. *Respondent was then bound to obtain and deliver the ties,* and *Railroad was bound to buy them.* Nothing more remained to be done but delivery, and check of the ties by the Railroad against the specifications. The sales were completed outside the state.)

d. All ties furnished the Railroad out of Indiana, respondent obtained by purchase from local producers who supplied the ties at convenient loading points on the Railroad.

The purchase and sale arrangements were made *interstate* between respondent's Marietta, Ohio, office and producers in Indiana. (R. 38, ll. 35-40.) On receiving requisition orders from the Railroad, respondent sent specification and price list circulars to the producers. (R. 39). The producers, by phone, wire or mail, informed respondent at Marietta of the quantity and kind of ties they would furnish, and of the Railroad loading point where, and the time when, they would be ready. (R. 44, ll. 17-24.)

(*This,* under the regular course of business, *constituted a closed deal* between respondent and the producers. It was *a purchase and sale of all ties that met specifications.* The producer was paid for all such

ties, after inspection by the RR inspector.) (R. 45, ll. 16-21.)

e. When ties were ready at loading points, and freight cars were there, an inspector for Railroad and an agent of respondent sent from Marietta office met there. (R. 44, ll. 30-36.) The ties were inspected by the Railroad inspector "as loaded into the cars * * *" (R. 27, ll. 7-8.) *Loading and inspection were simultaneous.* Ties not meeting specifications were rejected.

f. After loading was completed, the Railroad inspector gave respondent's agent an inspection report showing quantity and kind of ties accepted and loaded. (R. 45, ll. 14-18.)

g. Respondent's agent made out a shipping report (R. 44, l. 37, to R. 45, l. 15), and also a *uniform type bill of lading*, showing respondent as consignor; Finney, Ohio, as the destination; and the Railroad (c/o its Chief Engineer of Maintenance), as consignee. (R. 45, ll. 26-28, and R. 48, l. 41, to R. 49, l. 5.) Copies of shipping report and bill of lading were sent to respondent's Marietta office, to its treatment plant at Finney, and to the Railroad at its Baltimore, Md., office. (R. 44, ll. 37-40, and R. 45, ll. 25-35.)

h. The car of ties was *then transported by the Railroad to the Finney, Ohio,* treatment plant. (R. 48, ll. 1-14.) No ties were ever diverted to any destination in Indiana or elsewhere. (R. 48, ll. 11-14; R. 49, ll. 25-27.)

i. Payment for ties was made from the Railroad's Baltimore office by check to respondent's Pittsburgh office. (R. 47, ll. 5-10.) No funds were ever received in Indiana. (R. 48, ll. 14-16.)

j. All ties sold the Railroad were required by the contracts to be shipped to one or the other of respondent's treatment plants. (*Supra*, pp. 5 (2)- 6 (3.))

Respondent sold no ties or timbers to any one except under contract that the ties should go to one of respondent's plants for treatment. (R. 20, l. 35, to R. 21, l. 5.)

k. The above-described steps constituted the uniform course of business during all the taxable years. (R. 49, ll. 32-36.)

Scope of Decision Below

The judgment of the Circuit Court of Appeals, as stated above, rests upon three separate grounds, each of which is distinct and independent of the others. If that Court was right as to any one of said grounds, its decision must, of course, be affirmed.

These separate grounds will, in the argument following, be dealt with in the same order as in the opinion of the Circuit Court of Appeals and as in petitioners' brief. The several reasons offered by petitioners for granting the writ will also be considered in connection with the particular ground of the judgment to which they refer.

Summary of Argument

Facts

During the taxable years 1934, 1935 and 1936, respondent, a Delaware corporation, main office at Pittsburgh, Pa., furnished cross-ties to Baltimore & Ohio Railroad Co., a Maryland corporation, main office at Baltimore, Md., under two written contracts and a supplemental agreement, all entered into outside of Indiana. One contract required the Railroad to deliver for treatment 600,000 ties annually to a treatment plant at Finney, Ohio, belonging (through a subsidiary) to respondent. The other provided, among other things, for the sale of raw ties to the railroad, delivered f. o. b. cars on the railroad's tracks; also for treatment of ties at another plant to be operated by respondent in West Virginia. The supplemental agreement required respondent to ship all ties delivered to the railroad in territory west of the Ohio River, including Indiana, to the plant at Finney, Ohio, for treatment. Respondent sold the railroad no ties that were not to be treated at one or the other of its plants before use. All of respondent's tie transactions were operated out of its branch office at Marietta, Ohio.

In Indiana, respondent itself produced no ties, but obtained them from local producers who supplied them at loading points on the railroad. When ties were ready, an inspector for the railroad, and an agent of respondent sent from respondent's office at Marietta, Ohio, met at the loading point; and as the ties were examined as to compliance with specifications, those

accepted by the railroad inspector were by the respondent loaded on freight cars furnished by the railroad at the loading point. The inspection and loading were simultaneous. Respondent paid the producer only for ties accepted by the railroad.

Respondent's agent made out bills of lading, with respondent as consignor, and the railroad's Chief Engineer of Maintenance at Finney, Ohio, as consignee. As cars of ties were loaded, they were carried under these shipping directions by the railroad to Finney. On reports sent in by respondent's agent, the Marietta office mailed weekly invoices to the railroad at its Baltimore office for ties sold and delivered to it, and made monthly reports of such invoices to respondent's main office at Pittsburgh. All payments for ties were made by the railroad by check from its Baltimore office to respondent's Pittsburgh office. These payments were deposited in respondent's Pittsburgh bank.

Respondent had no property in Indiana, maintained no office in Indiana, and no resident agent other than a statutory agent for service of process only. All bookkeeping functions were performed at its offices in Marietta and Pittsburgh. All gross receipts on which the tax here in question was assessed and collected were received by respondent from ties so furnished to the railroad.

During the entire taxable period, the practices and all proceedings followed the course of business indicated above and set out in detail in the Statement,

(*supra*, pp. 3-9.), and in the findings of the court at pages of the Record indicated in the Statement.

I

The tax imposed under the Indiana gross income tax law is an excise upon the privilege of receiving gross income. The taxable event is the receipt of gross income. No tax accrues from *the earning* of income or *when the income is due*. It can be assessed only after the income has been received.

The title of the Act limits its operation to "imposing a tax upon the receipt of gross income." Under the Constitution of Indiana, the provisions of an act cannot be extended beyond the scope of the specification in the title. No state court has construed the provision of Section 2 relied upon by petitioners with reference to the title of the Act. This Court has done so in the *Adams* case (304 U. S. 307, 309). In the administration of the Act, the provision relied on by the petitioners can be, and has been, given the full effect of its purpose without the construction now claimed by petitioners. The tax actually collected from non-residents, without the interpretation of Sec. 2 now urged by petitioners, has amounted to fourteen per cent of the total tax.* And a Department of Treasury regulation in force during the taxable period here involved (Reg. 16, Appendix, p. 83) definitely rejects and forbids such an interpretation. The gross income here was received by respondent at its main office in the State of

*See Footnote, *infra*, p. 28.

Pennsylvania. The tax was laid on the privilege of taking such receipts. As this privilege was exercised in and protected by the State of Pennsylvania, and not the State of Indiana, the latter state is without jurisdiction to impose the tax, and the collection of such is in violation of the due process clause of the 14th Amendment. (See Argument, *infra*, pp. 14-33).

II

If, as contended by petitioners, the tax is imposed on the privilege of transacting the business which is the source of the income, and the taxable event is the transaction of such business, the tax is still invalid, because it is imposed on the entire receipts from the business of furnishing ties, without apportionment, although the major part of the activities that lead to such receipts, and from which they are derived, occurred outside the State of Indiana. The tax thus laid on proceeds from activities both within and without the state, without being limited to those proceeds which represent proper allocation or apportionment of the activities within the state alone, is invalid as in violation of the due process clause of the 14th Amendment. (See Argument, *infra*, pp. 34-47.)

III

The tax is invalid in any event, because it is levied on gross receipts derived from interstate commerce, and is a type of tax which, if valid, subjects the commerce to the risk of taxes similar in substance that may be imposed in any state which the commerce touches,

and therefore violates the commerce clause of Article I, Sec. 8, of the Federal Constitution. (See Argument, *infra*, pp. 47-78.)

ARGUMENT

I

The Thing Taxed Is the Privilege of Receiving Gross Income

Disctussing the 1st Question Presented, and Covering Petitioners' Reasons 1, 2 and 3 for the Writ.

First. It is of highest importance in a tax case to determine the precise thing on which the tax is laid. This is the vital point on which the decisions turn; as, for example, in:

American Mfg. Co. v. St. Louis (1919), 250 U. S. 459, where a tax on the privilege of manufacturing, measured by gross receipts, was *upheld*, though the goods were sold in interstate commerce.

Utah Power & Light Co. v. Pfost (1932), 286 U. S. 165, where a tax on the privilege of generating electric current, measured by kilowatt hours, was *upheld*, though the current was moving in interstate commerce at the instant of generation.

Leach v. Nichols (1932), 285 U. S. 165, where in arriving at value of a net estate on which to reckon Federal estate tax, no deduction was allowed for state inheritance tax, because the state tax was con-

strued to be laid on the right *to receive* instead of on the right *to transfer*, though, of course, the amount of estate to be taxed and the circumstances on which the tax arose were identical.

Chassanoil v. Greenwood (1934), 291 U. S. 584, where a license tax on the privilege of engaging in business of buying and selling cotton was *upheld*, though the cotton was purchased for the purpose of shipment to out-of-state customers, because the tax was laid on a step that *preceded* the beginning of *interstate commerce.*

Fisher's Blend Station, Inc., v. Tax Commission (1936), 297 U. S. 650, where a tax on the privilege of broadcasting, measured by gross receipts, was held *invalid*, because the tax was levied *on gross receipts* from *the entire operations* which included both interstate and intrastate commerce, without allocation.

Puget Sound Stevedoring Co. v. Tax Commission (1937), 302 U. S. 90, where a tax on the privilege of engaging in business activities was held *invalid* as to receipts from the *work of loading goods on ships*, because the goods were bound for out-state or out-country destinations.

J. D. Adams Mfg. Co. v. Storen (1938), 304 U. S. 307, 314, where a tax on the privilege of receiving gross income was held *invalid*, because the receipts were derived from activities interstate as well as in-

trastate, and there was and could be no apportionment as to activities within the state. See comments on *Adams* case in *McGoldrick v. Berwind-White Coal Co.* (1940), 309 U. S. 33 at 57-58.

Felt & Tarrant Co. v. Gallagher (1939), 306 U. S. 62, where a tax on the privilege of use was *upheld*, though the tax attached immediately upon arrival of the property in interstate commerce.

Graybar Electric Co., Inc., v. Curry (1939), 189 So. 186, affirmed 308 U. S. 513, where a tax on the privilege of engaging in the business of selling at retail was *upheld*, as the sales *activities were all within the state*, though the goods were moved in interstate commerce.

McGoldrick v. Berwind-White Coal Co. (1940), 309 U. S. 33, where a tax on sales ("sale" being defined as "any transfer of title or possession, or both") was *upheld*, though there was interstate commerce, because delivery—mere physical "transfer of possession"—*was alone the taxable event*, and *this occurred within the state.*

Second. The decision of the court below is not in conflict with local decisions on a question of state law. On the contrary, it was required, and is supported, by the state court decisions.

(a) The title of the Act is specific as to what the tax shall be laid on. It reads:

"An Act to provide for the raising of public revenue by imposing a tax upon the receipt of gross income . . ." (Appendix, *infra*, p. 80.)

There is no ambiguity about this. It plainly defines the particular kind of tax that the revenue is to be raised from. It directly points to a tax on the privilege of receiving gross income, and *on no other kind* of privilege. There is nothing that remotely suggests a tax on the privilege of engaging in the business that may be the source of the income. It gives the administrative officers no leeway of discretion in construing the provisions which follow.

It is not the the type of title that has been held to authorize in the statute any sort of provisions that may relate to the subject. Under the Indiana Constitution only a title in broad and general terms may do that. Examples of such titles are:

"An Act concerning town officers," *Baltimore & Ohio R. R. Co. v. Town of Whiting* (1903), 161 Ind. 228, 230; "An Act concerning highways," *Smith v. Board* (1910), 173 Ind. 364; "An Act concerning drainage," *Thorn v. Silver* (1910), 174 Ind. 504; "An Act regulating descents and the apportionment of estates," *Stiers v. Mundy* (1910), 174 Ind. 651; "An Act concerning intoxicating liquors," *Board v. Scanlon* (1912), 178 Ind. 142; "An Act concerning municipal corporations," *Marion, Etc. Co. v. Simmons* (1913), 180 Ind. 289, 290; "An Act concerning public offenses . . . ," *Huffman v. State* (1933), 205 Ind. 75, 85.

The title here belongs to the class that the Supreme Court of Indiana uniformly since the adoption of the Constitution of 1851 has held to limit the scope of the act strictly to the wording of the title, and that provisions outside those plainly indicated by the specification in the title are invalid. The constitutional provision reads:

"Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title."

Constitution of Indiana, Art. IV, Sec. 19.

The following decisions are directly applicable:

In *Mewherter v. Price and Another* (1858), 11 Ind. 199, 201, the Court said:

". . . We have a statute entitled 'An act concerning promissory notes and bills of exchange,' which provides—

'That all promissory notes, bills of exchange, or other instruments of writing, signed by any person who promises to pay money, or acknowledges money to be due, or for the delivery of any specific article, or to convey property, or perform any stipulation

therein mentioned, shall be negotiable by indorsement thereon, etc. . . .

'The assignee of any such instrument may, in his own name, recover against the person who made the same.'

. . . We have seen that the title to the act under consideration is limited to promissory notes and bills of exchange. Its language is very explicit, and we know of no rule of construction by which it can be so extended as to embrace instruments in writing other than those which it expressly names. Hence, the title to which we have referred, cannot, in view of the constitutional provision above quoted, be held to embrace the subject of the contracts in suit; and the act itself, so far as it may, in terms, authorize their assignment, is plainly inoperative."

In *Marion School Twp., Etc. v. Smith* (1939), 215 Ind. 586, 589-590, 592, the title of the act reads:

"AN ACT providing for the levy of a tax to support the common schools of the state, providing for the apportionment and distribution of the money so raised, repealing all laws in conflict therewith, providing a penalty, and declaring an emergency."

The Court said:

"It has many times been said that the purposes of section 19 of Article 4 of the State Constitution are to prevent 'log rolling' legislation; to prevent

surprise, or fraud, in the Legislature by means of provisions in bills of which *the titles give no intimation;* and to apprise the people of the subject of legislation under consideration. Moore-Mansfield, etc., Co. v. Indianapolis, etc., R. Co. (1913), 179 Ind. 356, Ule v. State (1935), 208 Ind. 255. The Constitution of 1816 contained no such provision and the abuses that resulted therefrom are well illustrated by the following excerpt from the Report of Debates and Proceedings of the Constitutional Convention of 1850 (p. 1086):

'MR. MAGUIRE. I have heard much complaint—and there is undoubtedly some ground for the complaint—as to the manner in which legislation has sometimes been conducted in this State. I have a distinct recollection of a case somewhat similar to that referred to by the gentleman from Posey, where a section was inserted in a bill, otherwise unobjectionable, appropriating the sum of seventy-five thousand dollars for a private and local purpose. The bill had a general title, to which was added the words, "and for other purposes." The bill passed both branches of the Legislature, most probably without having been read through in either. It was discovered by the vigilance of Governor Noble, and sent back to the House in which it originated with his veto. On the question of its passage a second time it received but the single vote of the member by whom it was introduced. This and other cases to which reference might be made, shows the necessity of some measure to prevent their recurrence.'

. . . Conceding that the General Assembly might have exacted, as the price of such aid, that the teachers and bus drivers in school corporations accepting the benefits of the fund should be selected or appointed by the state department, we can not believe that any such legislative intent is disclosed by the title of the act under consideration. Our doubt upon that subject is so strong as to lead us to the conviction that it was not so intended. Would a member of the General Assembly, about to vote on chapter 167, Acts of 1933, or, would a citizen, desiring to follow the course of proposed legislation, be advised by the title of said act that it contained provisions authorizing the Department of Education to name the school teachers and bus drivers in a considerable number of the school corporations of the state? We think not. The scope of the proviso is not indicated by the title." To the same effect are:

Moore-Mansfield Construction Co. v. Indianapolis, Etc., Ry. Co. (1913), 179 Ind. 356, 367;

Crabbs v. State (1923), 193 Ind. 248, 253-254, quoting from Sutherland Statutory Construction, Sec. 87, p. 94, and Cooley, Constitutional Limitations (6th Ed.) 178.

The Indiana decisions cited by petitioners do not aid them. There has been no case, either in the highest or a lower court of Indiana, that remotely called for any consideration of the question here involved, or where any attempt was made, by court or counsel, to give or obtain a decision on the point.

In *Miles v. Department of Treasury* (1935), 209 Ind. 172, the suit was to enjoin certain steps under the Act on the ground that it was wholly unconstitutional and void. In holding the Act valid, all the Court had to do was to determine that the tax provided for was an excise tax and *not a property tax* (209 Ind. 172, at 177-188). This was all the Court was called upon to do, or tried to do. The particular type of privilege on which the tax was laid was not involved, and the Court made no attempt at precise definition.

In *Indiana Creosoting Co. v. McNutt* (1936), 210 Ind. 656, there was no issue that called for definition of the taxable event. The taxpayer *was domiciled in Indiana* and operating a creosoting plant in Indiana, and there was no contract or other obligation requiring the ties to be shipped either from or into another state. The Court merely quoted the statement in the Miles case, relied on by petitioners here, in connection with a remark that there was no attempt to lay *a property tax* on intangibles as the tax was an excise (p. 664).

In *J. D. Adams Mfg. Co. v. Storen* (1938), 304 U. S. 307, this Court had before it all decisions of the Indiana Supreme Court referred to by petitioners; and, as shown by its opinion, the Court considered the *title of the Act and all provisions of the text* in reaching a conclusion as to the particular privilege on which the tax is laid. The Court took the Attorney General of the state at his word, and held the tax was laid on the privilege of receiving gross income (304 U. S. at 311).

This is the *only tax in the United States* that is levied on the privilege of receiving gross income, as such. There are many taxes where gross income is used as a measure in computing a tax that is laid on some other privilege or taxable event. Here the tax is directly on the privilege of receiving gross income; and the amount of gross income is also used as a measure in computing the tax. Thus, the privilege taxed, and the measure of the tax, are coincidental. And this is what has made the subject confusing to the petitioners and has led them into specious arguments.

In choosing to enact this law, the legislature must be presumed *to have weighed the advantages and disadvantages* of various types of taxes. It selected the gross income tax, realizing, of course, that no one type of tax can give the benefits of all and have the shortcomings of none. From the standpoint of revenue, the results have justified the choice.* It is simply an inherent weakness of the tax that it cannot be laid on a nonresident who, without effort to evade, normally receives his gross income in the state of his domicile, even though such income is derived from sales of goods originating and delivered in the State of Indiana.

This inherent defect the state must accept, just as it accepts the unusual benefits derived from this type of tax, and *just as it had to accept the inherent defect that the tax could not reach receipts from interstate commerce*—a much larger source of revenue than the occasional source here involved.

*See Footnote, *infra*, p. 28.

(b) *The regulations promulgated by petitioners, in force during the taxable period, totally contradict petitioners' present contention as to the taxable event.*

These regulations were printed in full in the Record (pp. 75-148) in *J. D. Adams Mfg. Co. v. Storen* (October Term, 1937, No. 641; decided May 16, 1938), 304 U. S. 307. The Court considered and expressly referred to a number of these in its opinion (304 U. S. at 311, 313). The following regulation, not referred to in the briefs or opinion in the Adams case, clearly discloses the meaning the petitioners *then* placed on Section 2 of the Act:

> "Reg. 16 (In Art. 2). Effective date of law.—Tax shall apply to and shall be levied and collected upon all gross income received on or after the first day of May, 1933, regardless of the fact that such income was earned or became due prior to that date." (Adams case Record, p. 78.)

It is clear that the tax could legally be applied to *gross income* received after the Act went in force, because the tax is laid on the privilege of *receiving* gross income; but the Regulation plainly recognizes that the tax cannot be applied to income that was only earned or became due, but not received, before the Act was in force. So, if, as to non-residents, the tax is laid on the privilege of *engaging in business that is the source* of the income, then non-residents would have been exempt as to all income earned or due before, but *paid after*, the Act went in force, because they could not be taxed on a privilege exercised before the Act was in force.

And this exemption would have applied to *all* non-residents, including those having property and operating a fully integrated business and receiving the income therefrom within the state. It is common knowledge that non-residents of this class were taxed on all income *received* after the Act was in force, even though it was earned and became due prior thereto. So the taxing officials *must* have construed the Act, as shown by Reg. 16, as taxing the privilege of receiving income and not the privilege of engaging in the business that produced the income. Otherwise the taxing of such non-residents would have been invalid because applied retroactively to a privilege exercised before the Act was passed.

This conclusion is in accord with the position of the Attorney General in the Adams case which the Court refers to in its opinion (304 U. S. at p. 311). The statement of the Attorney General there referred to was in his final memorandum brief in the Adams case entitled "Summary of Oral Argument," where he said: "It is a *privilege tax* levied *upon the receipt of gross income* in Indiana, the domiciliary state of appellant . . .," and "The receipt of income by a *resident* of the taxing sovereignty is a taxable event." The Attorney General there quoted from *New York, ex rel. Cohn v. Graves*, 300 U. S. 308, 313, as follows: "That the receipt of income by *a resident of the territory of a taxing sovereignty* is a taxable event is universally recognized. Domicile itself affords the basis for such taxation."

Thus, the Attorney General there asserted, and this Court there held, that the thing taxed is *the privilege of*

receiving gross income within the borders of the taxing sovereignty.

(c) *The Adams case supports the decision of the Circuit Court of Appeals.* In the *Adams* case, the Court dealt with the question whether the tax can be imposed on the privilege of "transacting business," as now urged. It said (304 U. S. at 310): "Nor is it for the transaction of business since in many instances it hits the receipt of income from one who conducts no business." This refers to the fact that under the Act the incidence of the tax has no relation to the sources of the gross income which is taxed. All income received *within the state* is taxed regardless of its source.

Had this Court deemed otherwise, it would have followed *American Mfg. Co. v. St. Louis*, 250 U. S. 459, where, though the goods were sold in interstate commerce, the precise thing on which the tax was laid was the privilege of manufacturing in the city of St. Louis, within the state. After considering the type of tax held valid in the *American Mfg. Co.* case, this Court said (*Adams* case, 304 U. S. at 313): "So far as the sale price of the goods sold in interstate commerce includes compensation for a purely intrastate activity . . . it may be reached for local taxation by a tax on the privilege of manufacturing . . .".

Thus, this Court expressed a clear decision that the tax is not laid on the privilege of engaging in the business which produces and is the source of the income, but is laid only on the privilege of *receiving* such income.

Petitioners seek to avoid the *Adams* case by saying the tax here is authorized by Section 2 of the Act, which reads in part:

> "... Such tax shall be levied upon the entire gross income of all *residents* of the State of Indiana, and upon the gross income derived from sources within the State of Indiana, of all persons and/or companies, including banks, who are *not residents* of the State of Indiana, but are engaged in business in this state, or who derive gross income from sources within this state ..."

This contention is based upon failure to understand the language and its purpose. The first clause in the above sentence applies the tax to *residents*—those legally domiciled in Indiana. But this alone would not reach those living or engaging in business in Indiana and receiving income there, but *who are not legal residents*. The second clause, on which petitioners rely, was to fill this gap. It says the tax shall be levied:

> "... upon the gross income ... of all persons and/or companies, including banks, who are *not* residents ... but are engaged in business in the state, or who derive income from sources within the state."

This was to make the tax reach, and it does reach, hundreds of companies and persons who, *though not legally domiciled in Indiana*, engage in business and receive the income therefrom within the state. It also reaches non-resident individuals who, though not in

business, live in the state all or part of the year and there receive income from business, rentals, trusts or other sources located in the state.

This is the function, and the only function, of the language in Section 2. So construed, it serves fully the necessary purpose it was intended to serve,* without applying the interpretation urged here. But if the law was intended, or is construed, to reach gross income

*NOTE—In the October, 1940, issue of "Tax Facts Review" prepared and distributed to the public by the Gross Income Tax Division of Indiana Department of Treasury Board, the petitioners, speaking of the efficiency of this tax, said: "The gross income tax, the fourth of the new taxes and now the third largest source of public revenue in Indiana, was enacted by the state General Assembly in 1933 . . . Property tax is the largest and gasoline tax is second largest, when both state and local revenue are considered. Considering state collections only, gasoline tax is first and gross income tax is second. (p. 8.) . . . As a source of revenue the gross income tax has proven to be entirely adequate. It should be noted that gross income tax collections, by their very nature coupled closely with the general business, industry, and income reverses or prosperity, have, with the exception of one year, risen steadily since 1933. The gross income tax during the fiscal year 1939-40 produced $23,648,497.28, an all-time high." (p. 9.)

Further, in discussing "Tax Payments by Non-Residents" (p. 28), petitioners say that non-residents in 1939 paid to the State in gross income tax the sum of $3,252,549.48, "or 14.03 per cent of the total tax for that year," and also "The table below shows that revenue from this source has increased to a remarkable extent since 1933 which would indicate that residents of other states have found that Indiana's taxing policies in combination with other favorable factors offered business and industry a remarkable combination of advantages."

which *in the normal course of business* is received by non-residents at *their domicile in another state*, then it is an invalid attempt to do something that is legally impossible because such a tax is beyond the sovereignty of the State of Indiana, and constitutes an invasion of the sovereignty of another state.

The state cannot, merely by legislative enactment, project its jurisdiction over taxable events beyond its borders.

It did not try to do so here, for the real meaning of the Act gives it full range of application to gross income received in the state by non-residents, without reaching to income which in the necessary course of business is received in other states.

Third. The decision of the Circuit Court of Appeals is not in conflict with decisions of this Court.

In *Lawrence v. State Commission* (1932), 286 U. S. 276, the Court considered the question whether a state income tax could be applied to income earned outside the state. In holding such income was not exempt from the state tax, the Court said (p. 281):

> "The tax, . . . is founded upon the protection afforded to the recipient of the income by the state, in his person, *in his right to receive the income*, and in his enjoyment of it when received."

And in *Graves v. New York* (1939), 306 U. S. 466, where it was held that the salary of an employee of

the Home Owners' Loan Corporation was not exempt from the state income tax, the Court in discussing the character of the tax, said (p. 480):

> "It is measured by income which becomes the property of the taxpayer when received as compensation for his services; and the tax laid *upon the privilege of receiving it* is paid from his private funds and not from the funds of the Government, either directly or indirectly. The theory, which once won a qualified approval, that a tax on income is legally or economically a *tax on its source*, is *no longer tenable*. . . ."

So the taxable event did not occur in the State of Indiana, but occurred in the State of Pennsylvania, as all proceeds from plaintiff's tie business were received in Pittsburgh. It is beyond the jurisdiction of the taxing officers of Indiana, and the collection of such a tax violates the due process clause of the 14th Amendment.

> "A statute of a state which undertakes to tax things wholly beyond her jurisdiction or control conflicts with the 14th Amendment." *Safe Deposit and T. Co. v. Virginia* (1929), 280 U. S. 83, 92.

> "A tax on property and *rights* wholly beyond the confines of the state constitutes a taking thereof without due process of law." 1 *Cooley on Taxation* (4th Ed.), Sec. 94, p. 222.

In *Guaranty Trust Co. v. Virginia* (1938), 305 U. S.

19, after referring to other due process cases, the Court said (p. 23):

> "Those cases go upon the theory that the taxing power of a state *is restricted to her confines* and may not be exercised in respect of subjects beyond them. Here, the thing taxed was *receipt of income within Virginia* by a citizen residing there."

And in *Curry v. McCanless* (1939), 307 U. S. 357, the Court said (p. 366):

> "The power to tax 'is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a state extends, are objects of taxation; but those *over which it does not extend, are*, upon the soundest principles, *exempt from taxation.*' *McCulloch v. Maryland*, 4 Wheat. 316, 429, 4 L. ed. 579, 607."

The state clearly had no jurisdiction to lay a tax on gross income received in Pennsylvania in the regular course of business, and the tax must fall.

On the question now being considered, petitioners also cite two decisions of this Court. Both of these further illustrate the importance of knowing the precise thing the tax is laid upon.

In *Equitable Life Assurance Society v. Pennsylvania* (1915), 238 U. S. 143, the tax related to premiums received by insurance companies. The company contended it was a tax on property, but the Act was con-

strued both by the state court and this Court as levying "a tax for the privilege of doing business within the Commonwealth."

The Indiana Gross Income Tax Act is not, and does not purport to be, a law fixing conditions for a foreign corporation to do business. That function is performed by the Indiana General Corporations Act of 1929.

In *Wisconsin v. J. C. Penney Co.* (Dec. 16, 1940), 85 L. Ed. advance paging 222), the taxpayer was a large concern owning property in Wisconsin and engaged there in the business of operating chain stores. Its business activities were as fully integrated within the state as other store companies having their legal domicile there. The entire business activities out of which arose the dividends on which the tax was imposed were carried on in Wisconsin. The taxpayer was doing business in Wisconsin as completely as if it had been domiciled and was operating in that state alone. The tax was apportioned entirely to activities carried on within the state, and was considered by this Court as bearing a just fiscal relation to the protection, opportunities and benefits given by the state.

In the instant case, the taxpayer has no property in the State of Indiana. It has no office, warehouse or agency, and operates no business, in Indiana. The tie transactions between respondent and the B. & O. Railroad consist of activities almost entirely outside the state. Both parties to the transactions are domiciled in other states, and the contracts under which the ties

were purchased and sold were entered into outside the state. The only activity of respondent to which the tax could have any possible relation was the service of its agent in making physical delivery of the ties by loading them on cars for shipment to Finney, Ohio, and reporting the same.

This activity was not of such character as even to have required respondent to qualify in the state as a foreign corporation because it was interstate commerce. *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 291, 292-293.

Thus, the only activity here for which the state gave respondent an opportunity was not the "substantial privilege of carrying on business," as in the Wisconsin case, but only the placing of ties on cars. The amount of the tax, one per cent on the entire gross proceeds from the transactions, is an excessive exaction for the privilege of loading ties on a car in Indiana and reporting thereon. The tax bears no just "fiscal relation to the protection, opportunities and benefits given by the state."

The tax here is immeasurably greater than the Wisconsin tax for the benefits given by the state. Neither the incidence of the tax nor its measure is tied to that proportion of the earnings which the State of Indiana made possible, because the gross income is the result of all the activities and transactions outside of Indiana which led to the delivery.

II

The Activities Were Chiefly in Other States, and There Was No Apportionment of the Tax.

Discussing the 2nd Question Presented, and Covering Petitioners' Reasons 4, 5, 6, 7, 8 and 9 for the Writ.

First (a) *The tax is invalid because without apportionment it was imposed on gross receipts arising from activities without as well as within the state.* Petitioners say that the thing here taxed is not the privilege of receiving gross income, but the privilege of engaging, within the state, in a business which is the source of that income. If this be so, then, unless all essential activities from which the taxed receipts arise occur within the state, there must be an apportionment. No tax can legally be imposed by a state except on such portion of gross receipts as represents the business activities occurring within its borders. *Gwin, White & Prince, Inc. v. Henneford* (1939), 305 U. S. 434 at 438-439; *Adams Mfg. Co. v. Storen* (1938), 304 U. S. 307 at 313-314; *McGoldrick v. Berwind-White Coal. Co.* (1940), 309 U. S. 33 at 57-58; *Ford Motor Co. v. Beauchamp* (1940), 308 U. S. 331 at 337; *James v. Dravo Contracting Co.* (1937), 302 U. S. 134 at 138-139; *Dravo Contracting Co. v. James* (C. C. A. 4, Sept. 6, 1940), 114 F. (2d) 242 at 245.

Section 2 of the Act imposes the tax. Section 3 directs the manner of levy and the rate of the tax. Section 3(c), under which the tax here was levied, reads:

"Sec. 3. The tax hereby provided for shall be imposed at the following rates: . . .

(c) Upon the *entire* gross income of every person engaged in the business of retailing of any tangible commodity or commodities not specifically mentioned in subsection (d) of this section, one per cent."

(Appendix, p. 81; Ch. 50, Indiana Acts 1933, pp. 388, 391; Burns' Ind. Stat. 1933, Secs. 64-2601, 64-2603.)

Under this "statutory command," (see petitioners' brief, p. 24) the taxing officials are entirely without power, under any circumstances, or at any stage, to make an assessment on anything less than the "*entire* gross income" received by the taxpayer.

It follows that if essential activities leading to the delivery and sale of ties—and the receipts therefrom—occur outside the state, there is no jurisdiction to levy a tax on such portion of the receipts as flow from such activities, and the entire tax must fall.

Petitioners recognize this, so they offer the unique idea that only the *physical work* of delivering ties contributed to the proceeds. In their view all prior steps and transactions—negotiation of contracts, requisition orders, arranging with producers for ties, management, office functions and other overhead, all of which occurred outside of Indiana—are merely expense items and lead to no revenues. They ignore the fact that all

activities that were necessary to bring about the sales, or that incurred any expense reflected in the price of ties, are responsible for a portion of the proceeds.

As said by the Circuit Court of Appeals (R. 76-77, 114 F. (2d) at 926-927), had it not been for outside activities "there would have been no source of income in Indiana or elsewhere." The activities outside of Indiana which led to the gross receipts from ties are not limited, as stated by the petitioners, to "bookkeeping, invoicing and matters of similar character" (petitioners' brief, p. 31). For convenience, we summarize again the activities which constitute the tie transactions between respondent and the railroad:

Negotiation of contract between the railroad and Joyce-Watkins Co. and *assignment* to the respondent. This contract gave the railroad exclusive right on all ties respondent produced or purchased in areas near the railroad; required respondent on demand to produce or purchase for sale to the railroad all ties available in such territory; limited respondent's margin of profit on ties; authorized requisition orders; fixed methods of inspection and loading; and otherwise controlled the tie transactions.

Negotiation of contract between railroad and Central Creosoting Co., and *acquisition of control* by respondent of the latter's interest in treatment plant at Finney, Ohio. This contract required railroad to deliver 600,000 ties annually to the Finney plant for treatment. *Supplemental instructions*

from railroad, agreed to and followed by respondent, that all ties originating west of the Ohio River should be shipped to the Finney plant.

These contracts together *bound* respondent to furnish ties on requistion orders, and *bound* the railroad to have them shipped to Finney for treatment.

Activities pursuant to these contracts, include the receiving of requistion orders at Marietta, and acknowledgment of same which closed the deal as to each batch of ties; making purchase of ties out of Marietta, Ohio, office by exchange of mail, phone or telegraph communications with producers in Indiana; arranging out of Marietta office to send agent of respondent to attend loading of ties in Indiana and make reports; loading of ties on cars *in transit* to Finney, Ohio; receiving of all reports at the Marietta and Pittsburgh offices from respondent's loading agent; performing of all office and administrative functions connected with the transactions.

That the activities incidental to obtaining these contracts and the operations under them, *outside the state*, contributed to and were reflected in the gross receipts which were taxed, can not be doubted. The view of the Circuit Court of Appeals on this question is indubitably sound.

The above summary of activities in sales of ties to the railroad makes clear that it is impossible for

anyone, either tax collector or taxpayer, without legislative assistance, to allocate the portion, in dollars, of gross receipts that represents activities occurring in Indiana alone.

In such cases, where no rational apportionment is possible, and where the tax statute does not itself fix a formula for making such apportionment, *no tax at all can be levied. Dravo Contracting Co. v. James*, 114 F. (2d) 242, at 244, points 1-3. This is because it can not be levied on the basis of state activities alone, and the state has no jurisdiction to levy a tax upon activities, or the proceeds from activities, that occur in another state.

This certainly is what the Court meant in the *Adams* case (304 U. S. 307), where, construing this Act, it said (p. 314):

> "It is because the tax, forbidden as to interstate commerce, reaches indiscriminately and *without apportionment*, the gross compensation for both interstate commerce and intrastate activities that *it must fail in its entirety* so far as applied to receipts from sales interstate."

And it must be what the Court meant in *Gwin, White & Prince, Inc. v. Henneford* (1939), 305 U. S. 434, at pp. 438-439; and in *McGoldrick v. Berwind-White Coal Co.* (1940), 309 U. S. 33, at pp. 57-58; and in *James v. Dravo Contracting Co.*, 302 U. S. 134.

In the *Dravo* case, there was in question a West Virginia statute providing for "annual privilege taxes" on "business and other activities," including the business of contracting. The tax was measured by gross receipts. Dravo had a Government contract for constructing certain dams within the state. The case was briefed and argued on whether the contractor was exempt from the tax as an instrumentality of Government.

The Court, on its own initiative, pointed out that in any event the Dravo Company could not be taxed on its gross receipts derived from activities outside the state. The Court said (pp. 138, 139):

> "*First.*—As to territorial jurisdiction.—Unless the activities which are the subject of the tax were carried on within the territorial limits of West Virginia, the State had no jurisdiction to impose the tax. Hans Rees' Sons v. North Carolina, 283 U. S. 123, 133, 134; Shaffer v. Carter, 252 U. S. 37, 57; Surplus Trading Co. v. Cook, 281 U. S. 647. The question has two aspects (1) as to work alleged to have been done outside the exterior limits of West Virginia and (2) as to work done within those limits but (a) in the bed of the rivers, . . .

It is clear that West Virginia had *no jurisdiction* to lay a tax upon respondent with *respect to this work done in Pennsylvania.* As to the material and equipment there fabricated, the business and activities of respondent in West Virginia consisted of the

installation at the respective sites within that State and *an apportionment would in any event be necessary to limit the tax accordingly.* Hans Rees' Sons v. North Carolina, 283 U. S. 123, 131-132."

In *Ford Motor Co. v. Beauchamp*, 308 U. S. 331, where a corporate franchise tax was upheld, this Court re-affirmed its position in the Dravo case, saying:

"James v. Dravo Contracting Co. contains nothing contrary to this view. The statute under consideration there levied a privilege tax 'equal to two per cent of the gross income of the business.' In so far as it was *upon receipts in other states*, it was conceded to be outside of the taxing powers of the statute" (p. 337).

The scope of a state's power to tax is succinctly stated by this Court in *Lawrence v. State Tax Commission* (1932), 286 U. S. 276, at 279-280, as follows:

"The Federal Constitution . . . leaves the states unrestricted in their power to tax those *domiciled* within them, so long as the tax imposed is *upon property within the state* or *on privileges enjoyed there*, and is not so palpably arbitrary or unreasonable as to infringe the 14th Amendment. Kirtland v. Hotchkiss, 100 U. S. 491, supra."

The Court re-affirmed the same principle in *Connecticut General Life Insurance Co. v. Johnson, State Treas.* (1938), 303 U. S. 77. There, the California

Supreme Court construed the law imposing a tax on "gross premiums received upon . . . business done in this state" as applying to gross premiums *received in Connecticut* upon reinsurance of policies taken by other companies in California. Appellant was qualified to do business in California, and actually carried on business there. In reversing the state court, this Court said (p. 80):

> "But the limits of the state's legislative jurisdiction to tax, prescribed by the Fourteenth Amendment, are to be ascertained *by reference to the incidence of the tax upon its objects* rather than the ultimate thrust of the economic benefits and burdens of transactions within the state . . . Hence it is that a state *which controls the property and activities* within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause *denies* to the state *power to tax or regulate* the corporation's property and activities elsewhere."

(b) *The burden of making an apportionment is not upon the taxpayer but upon the state.* The true rule may be stated thus: If the state seeks to impose a tax on receipts from activities that are partly without and partly within the state, the burden is upon the state itself to make the apportionment, and to segregate and tax only receipts from such activities as are wholly within the state. If the state itself has made a good-faith effort to make such allocation, *then and only then* is there a burden upon the taxpayer; and that is, to

show that the apportionment made by the state is unreasonable or arbitrary.

This is clearly settled in *Hans Rees' Sons v. North Carolina* (1931), 283 U. S. 123, 133, where the Court said:

> "The difficulty of making an exact apportionment is apparent and hence, *when the state has adopted* a method not intrinsically arbitrary, it will be sustained until proof is offered of an unreasonable and arbitrary application in particular cases. But the fact that the corporate enterprise is a unitary one, in the sense that the ultimate gain is derived from the entire business, does not mean that for the purpose of taxation the activities which are conducted in different jurisdictions are to be regarded as 'component parts of a single unit' so that the entire net income may be taxed in one state *regardless of the extent to which it may be derived from the conduct of the enterprise in another state.*"

The state has made no apportionment here and the statute provides for none. This relieves respondent from any burden of making an apportionment and likewise relieves it from any tax levied upon the entire receipts.

Petitioners urge as a major part of their argument on this point (petitioners' brief, pp. 35-36) that the burden of making an apportionment falls upon the respondent merely because *respondent is plaintiff in the action.*

This is both unsound and unfair. Respondent had no alternative but to pay the tax and then sue for a refund. The statute provides this procedure as the taxpayer's remedy (see 12 (a), Appendix, p. 82). It is a complete and adequate remedy.

Respondent could not sue to restrain petitioners from collecting the tax as a Federal Court has no jurisdiction in equity to enjoin state officials from collecting a state tax when the statute provides an adequate remedy at law. This is settled by the Judicial Code and by decisions of this Court.

Section 267 of the Judicial Code provides:

> "Suits in equity shall not be sustained in any Court of the United States in any case where a plain, adequate and complete remedy may be had at law," 28 U. S. C. A., Section 384.

In *Matthews v. Rodgers*, 284 U. S. 521, 525-526, this Court said:

> "Whenever the question has been presented, this Court has uniformly held that the mere illegality or unconstitutionality of a state or municipal tax is not in itself a ground for equitable relief in the courts of the United States. *If the remedy at law is plain, adequate, and complete, the aggrieved party is left to that remedy in the state courts*, from which the cause may be brought to this Court for review if any federal question be involved, Judicial Code,

Sec. 237, U. S. C. title 28, Sec. 344, *or to his suit at law in the federal courts if the essential elements of federal jurisdiction are present.*"

It ill becomes petitioners to seek to penalize respondent for pursuing the only course that was open to protect itself from what it deemed to be an unjust and invalid tax.

Second. The Circuit Court of Appeals did not in this case render a decision in conflict with the decision of another Circuit Court of Appeals.

The case of *Dravo Contracting Co. v. James*, 114 F. (2d) 242, is not in conflict with the decision here, but is in harmony with it.

The activities outside of West Virginia (the taxing state) had been segregated in the District Court, and the tax on the receipts therefrom was eliminated. There was no dispute on this, as it was required by order of this Court in 302 U. S. 134. The one question before the District Court, and appealed to the Circuit Court of Appeals for the Fourth Circuit, was whether *any tax at all* could be levied against Dravo Contracting Co., which contended the entire tax was void because no method of apportionment had been provided by statute. The Circuit Court of Appeals upheld the tax against receipts from activities occurring in West Virginia. Whatever was said in the opinion was relevant only in support of this holding, which was clearly sound.

There was a natural basis for apportionment of the tax in the Dravo case. The activities were such as to lend themselves readily to separation for the purpose of computing the tax on the receipts therefrom. The District Court did not create a formula for the apportionment—that was beyond its jurisdiction. The formula created itself, for the transactions under the contract that occurred in Pennsylvania were separately paid for in that state.

The contractor was domiciled in Pennsylvania, certain of the activities essential to the construction work in West Virginia were in the regular course of business performed in Pennsylvania, and the contractor received his payment there.

Here, substantially all of the activities leading to ultimate delivery of ties to the railroad occurred in Pennsylvania, Maryland and Ohio, and payment for *all* the activities under the contracts was made in Pennsylvania. Only a minor fraction of the time, effort and cost leading to delivery of ties occurred in Indiana. The Fourth Circuit in its opinion in the Dravo case completely supports the decision of the Seventh Circuit in this case when the former said (114 F. (2d) at p. 245):

"We agree with taxpayer that the court was without power to apportion its income on the basis of the cost of the activities involved in earning the income within and without the state. No such basis of apportionment is prescribed by statute; and, in the ab-

sence of statute, the court is without power to adopt it, as this is a legislative function involved in the imposition of the tax, and, therefore, not one which courts may exercise. (Citing Cases.) In cases where the tax imposed is not in its nature divisible and some part thereof is beyond the taxing power of the state and no provision is made for apportionment, the whole tax is void. Gwin, White & Prince, Inc. v. Henneford, 305 U. S. 434. Adams Mfg. Co. v. Storen, 304 U. S. 307. Bowman v. Continental Oil Co., 256 U. S. 642. As said by Mr. Justice Holmes in Meyer, Auditor of the State of Oklahoma v. Wells, Fargo & Co., 223 U. S. 298, 302, 'Neither the court below nor this court can reshape the statute simply because it embraces elements that it might have reached if it had been drawn with a different measure and intent.' If, therefore, any such apportionment as was made by the court below were necessary *to separate the portion of the income which the state has jurisdiction to tax from the remainder*, the tax would unquestionably be void in its entirety."

Third. The decision of the Circuit Court of Appeals is not in conflict with applicable decisions of this Court.

The decisions cited by petitioners support our theme instead of theirs. In *Pittsburgh Life & Trust Co. v. Young* (1916), 172 N. C. 470, 90 S. E. 568, there was no occasion for apportionment of the tax, because the entire activities from which the receipts were derived occurred in the taxing state. In *Underwood Type-*

writer Co. v. Chamberlain (1920), 254 U. S. 113, and in *Bass, Ratcliff & Gretton, Ltd., v. State Tax Commission* (1924), 226 U. S. 271, the tax was not imposed on the entire activities from which the taxed receipts were derived. Instead, on a basis provided in the taxing acts, the tax was laid only on such portion of gross receipts as fairly represented activities occurring in the taxing state.

III

The Commerce Was Interstate, and the Tax Invalid.

Discussing the 3rd Question Presented, and Covering Petitioners' 10th and 11th Reasons for the Writ.

First. (1) *The activities here were in interstate commerce.*

The contracts on which the business was based were between parties with domiciles and branch offices in different states, neither in Indiana. Both contracts contemplate interstate transactions. One, between the B. & O. Railroad and respondent as assignee (called the Joyce-Watkins contract), requires respondent to furnish ties from territory near the railroad and within economical distance from the treatment plants. Another, between the railroad and respondent's subsidiary, National Lumber & Creosoting Company, requires the railroad to send 600,000 ties each year to respondent's plant at Finney, Ohio, for treatment. And a third agreement, supplemental to the above, requires respondent to " . . . ship all ties originating at points

on the B. & O. Railroad west of the Ohio River to Finney, Ohio . . . "

Pursuant to these contracts, a course of business in furnishing ties to the railroad was established before the tax act was in existence. The Circuit Court of Appeals correctly held that the transactions under this course of business were interstate commerce.

Petitioners merely repeat here their arguments below. They say there was nothing in the contracts which required the railroad to buy any cross-ties from respondent; that there was only an option for ties; that no sale took place until the individual ties were ascertained by inspection at the instant of delivery; that nothing required any shipment of ties interstate or otherwise; that the place where title passed is important; that the commerce was not interstate because the purchaser was a common carrier transporting its own property; etc.

This argument is interesting as theory, but it ignores all the realties of business operations. It also ignores facts found by the District Court. Before going into the specific facts, we offer a short resumé of the realities of the situation.

The Joyce-Watkins contract, during the taxable period, was between two business concerns desiring to co-operate for the advantage of both. The railroad owned a treatment plant in Green Springs, W. Va., of which respondent was lessee and was operating. The

railroad also had a contract with respondent (as successor owner through a subsidiary) which required the railroad annually to send 600,000 ties to respondent's Finney, Ohio, plant for treatment. Both parties knew each other's business needs. Nothing was more natural or essential than that the railroad should buy ties of respondent. It would not have been normal, nor conducive to each other's interests, for the railroad to have bought its ties from outsiders. Thus, the business relationship between the parties, as well as their contracts, *compelled* the railroad to buy its ties from respondent.

The railroad was operating lines of great mileage. It *had* to have new ties. It *had* to have them treated for preservation. Both parties knew this when respondent became lessee of the Green Springs, W. Va., plant. In the lease contract with respondent, the railroad had agreed to deliver to the Green Springs plant "the ties and other forest products which it desires to have treated." The maintenance of its lines *compelled* it to "desire" to have the ties treated (R. 23, 11. 1-7). So the actual requirements of the contract made the railroad send the raw ties to one or the other of respondent's treatment plants. The same contract compelled respondent to acquire, and sell and deliver to the railroad, all ties ordered by it in territory convenient to the railroad (R. 25, 11. 40-45; R. 26, 11. 10-15).

There can be no doubt as to what these provisions of the contracts implied under existing circumstances.

They implied *a course of business exactly such as the parties* actually followed. And this course of business began *prior to the tax Act.* The contract of the railroad for treatment of ties at the Finney, Ohio, plant was in force since December 21, 1922, and respondent's ownership (through its subsidiary) began prior to 1933. So the railroad must have been sending ties out of Indiana to the Finney plant both before and after respondent's ownership thereof and prior to 1933. (R. 29; R. 38, 11. 10-25.) This is confirmed by the natural implication of the words "of course" in the shipping directions of the railroad before operations began by respondent under the Joyce-Watkins Green Springs contract. (R. 49, 11. 21-24.)

So, the railroad from Baltimore gave orders for ties to respondent which were acknowledged from Marietta, and thus *became definite obligations.* They were obligations which, under the contracts, required respondent to furnish and deliver, and the railroad to accept, the full number of ties ordered to the extent they complied with the railroad specifications. The "ascertainment" at the railroad siding was nothing but *a checking against specifications*—a thing entirely customary in all lines of business before a purchase is finally accepted, however absolute may be the contract.

As to the interstate destination of the ties, the railroad had contracted, as before shown, to send all ties it desired treated under the Joyce-Watkins contract to the Green Springs plant. For convenience and econ-

omy, it modified this contract, with respondent's consent, so that respondent should ship all ties originating west of the Ohio River to the Finney, Ohio, plant, where the railroad was required to have 600,000 ties per year treated. (R. 49, ll. 9-26.) So, beyond all caviling, the contracts *did* require the Indiana ties to be shipped to Ohio, and neither the railroad nor respondent could have done anything else *without violating contract obligations.*

The findings by the District Court that support the above resume are referred to in the condensed statement at the opening of this brief (*supra*, pp. 4-9), and are found chiefly in paragraphs: *b* (1), (2) and (3); *c; e; g; h; j; k.* The facts will be specifically stated under the respective points discussed below.

a. The sales took place outside of Indiana. Petitioners urge that the sale of ties to the railroad, as well as delivery of the ties, occurred within the state. The facts contradict this view.

Under the decisions, it is wholly unimportant as to existence of interstate commerce, whether the bargain touching the sale was concluded within or without the state. However, to settle the question, the court's findings, including provisions of the contracts touching this point, will be assembled and analyzed.

The Joyce-Watkins contract was assigned to respondent May 3, 1933, "and all ties supplied to the

Railroad Company have been supplied under that contract." (R. 29, 11. 14-22.)

"The Contractor agrees to sell to the Railroad all ties produced or purchased by it originating in territory from which ties in the usual course of business would be brought to the lines of the Railroad to the extent that the Railroad may give orders to the Contractor for the purchase of such ties." (Joyce-Watkins contract, R. 25, 11, 40-46.)

"The Contractor will produce or purchase from other producers the ties so ordered, and sell and deliver the same to the Railroad as ordered . . ." (Same contract, R. 26, 11. 10-15.)

Under the above clauses, the railroad could, and did, *demand* that respondent supply it with ties out of Indiana territory convenient to the railroad.

"The Purchasing Agent of the Railroad shall advise the Contractor from time to time in writing of the quantities and kinds of ties which the Railroad will need and the time within which it desires the ties to be delivered, and the price which the Railroad is willing to pay the Contractor f.o.b. cars on the railroad's tracks." (Same contract, R. 26, 11. 5-10.)

This clause provided for *requisition orders* from time to time. As the contract covered a period of five years from March 1, 1933, naturally it authorized purchase of the ties as needed and provided for price fluctuations.

Details of performance of the Joyce-Watkins contract, and the construction placed thereon by the parties when operating thereunder, indicate the sales did not take place in Indiana:

> "During the years in question, the following was the regular course of business: The *Railroad Company*, by telephone calls from its purchasing agent at Baltimore, Md., *advised* a representative of *the plaintiff* at its office *at Marietta, Ohio*, of the ties to be required by it for a certain period in advance, and the price which it would be willing to pay. The *oral communication of the order* of the Railroad Company for ties under the Joyce-Watkins contract *was acknowelged by agents of the plaintiff at Marietta, Ohio . . .*" (R. 38, 11. 26-35.)

It is plain that under the contract the requisition orders by railroad and acknowledgment thereof by respondent were intended to create, and did create, *a fixed obligation on respondent* to furnish the ties as ordered. The deal as to each batch was closed. Nothing remained to be done between respondent and the railroad, except inspection of the ties by the railroad as they were loaded by respondent. This is recognized in the ending of the above-quoted sentence, which continues: "and *thereupon* the plaintiff prepared and mailed to known producers" circulars stating specifications and prices for ties respondent was inviting them to furnish. (R. 38, 1. 35, to R. 44, 1. 16.)

The inspection of ties by the railroad was *not* for the purpose of completing the transaction of purchase and

sale, but for checking the ties *to see that they came up to specifications.*

The foregoing extracts from the findings show conclusively that all *sales* of ties *were concluded* entirely outside of Indiana. Consummation *by delivery* of the ties on board cars was a subsequent step, and took place in Indiana.

b. The contracts required interstate shipment of the ties. The findings plainly show that from the time operations under the contracts began, all ties originating west of the Ohio River were, at the instant requisition for them was made, definitely destined for shipment to Finney. Failure to ship them there would have been *violation of its contract* by respondent. Failure to transport them there would have been *violation of its contract* by the railroad.

There can be no mistaking the significance of the following findings and contract provisions:

"All of the ties furnished by plaintiff to the Baltimore & Ohio Railroad Company under the Joyce-Watkins contract during the years 1934, 1935 and 1936 were treated before use by the Railroad Company." (R. 49, 11. 28-31.)

"The Railroad agrees to deliver to the Contractor on cars at the treating plant the ties and other forest products which it desires to have treated." (Joyce-Watkins contract, R. 23, 11. 1-3.)

As all ties required preservative treatment before use, the above clause is a *definite agreement* by the railroad to send *all* ties to respondent's treatment plant at Green Springs, W. Va. To save distance in shipping, this was later modified to send ties originating west of the Ohio River *to Finney, Ohio.*

The shipping instructions, which constitute the supplemental agreement modifying the destination of ties originating west of the Ohio River (condensed statement, *supra*, par. *b* (3), p. 6), are:

> "You will, of course, ship all ties originating at points on the B. & O. Railroad west of the Ohio River to Finney, Ohio; and ties originating east of the Ohio River to Green Springs, W. Va." (R. 49, 11. 21-24.)

The Joyce-Watkins contract originally required the railroad to send all ties it wanted treated to the Green Springs, W. Va., plant; and except for the supplemental shipping instructions, accepted by respondent, the railroad would have had to send these specific ties to Green Springs, W. Va. But, as respondent operated the Finney plant, through its subsidiary, transfer of the ties to Finney for treatment was satisfactory to it. This was also in accord with the contract requiring the railroad to deliver 600,000 ties per year to that plant for treatment.

Except for these facts, which made respondent willing for the ties to go to Finney, it could, under the

Joyce-Watkins contract, *have compelled* the railroad to send the ties originating in Indiana *to Green Spring, W. Va.*, for treatment. And this also would have been a transaction in interstate commerce.

This is confirmed by the following finding:

> "It (the respondent) does not, however, sell ties or timbers to any one other than to those with whom it has a contract to treat such ties or timbers, nor does it produce or purchase ties or timbers for sale to any one other than to persons or corporations with whom it has a contract to treat the ties or timbers, and does treat the ties and timbers so produced and purchased." (R. 20, l. 35, to R. 21. l. 5.)

c. The course of business, pursuant to the contracts, was interstate commerce. The following findings show that by uniform practice both seller and buyer of the ties followed the mandate of the contracts to ship the ties to Finney, Ohio:

> "When the ties were ready at a loading point, an inspector of the plaintiff and of the Baltimore & Ohio Railroad Co. would go to the loading point, and all ties accepted by the Railroad Company's inspector were loaded by the producer on cars of the railroad. (R. 44, 11. 30-35.)

> "At the end of each day's loading of ties along the right of way of the Railroad in Indiana, the ties were billed by plaintiff's agent in the name of Wood

Preserving Corporation, as shipper, to the Baltimore & Ohio Railroad, in care of the person who was at the time Chief Engineer of Maintenance at Finney, Ohio." (R. 48, l. 41, to R. 49, l. 2.)

"One copy of the shipping report, together with the billing of cars, was sent forward to the Finney, Ohio, treatment plant and to the Baltimore, Md., office of the Railroad Company." (R. 45, ll. 26-30.)

"All of the ties originating in Indiana during the years of 1934, 1935 and 1936 were delivered to the Railroad Company f.o.b. cars at points of origin within Indiana, were carried by the Railroad Company from the point of origin in Indiana to the Finney, Ohio, treating plant, and there yarded, seasoned and treated pursuant to the Central Creosoting contract . . ." (R. 48, ll. 1-7.)

The above findings tell their own story without discussion, and prove conclusively that the course of business followed in shipping ties to Finney, Ohio, was *pursuant to contract agreements* and constitutes interstate commerce.

d. Loading the ties was interstate commerce. Title to the ties passed to the railroad either at the loading point in Indiana, or when they reached the Chief Engineer of Maintenance at Finney, Ohio—it is not important which. In *Dahnke-Walker Milling Co. v. Bondurant* (1921), 257 U. S. 282, 290-292 (discussed *infra*, p. 68), title to the farmer's wheat passed when

he delivered it f.o.b. cars at his home town in Kentucky, and before it started to its destination in Tennessee. There the wheat was to go to Tennessee, but the farmer did not pay the cost of transportation. Here the ties were to go to Ohio, but the seller did not pay the cost of transportation.

If title to the ties passed to the railroad at the loading point, it was held by respondent only for a moment. Ties waiting at the loading point belonged to the producer until accepted as to specifications by the railroad. Respondent paid for and acquired no ties except those accepted by the railroad inspector. When the parties were ready for a loading, they went to the pile of ties, with a car standing by, and as the railroad inspector examined the ties, each tie accepted by him was *instantly* loaded on the car. Respondent did not acquire title till then. Assuming that title passed from respondent to the railroad when the ties were laid on the cars, it was coincident with the delivery.

After the ties were acquired by plaintiff, they *did not come to rest in Indiana.* They were on their way to Finney, Ohio, and in interstate commerce, at the instant of approval by the railroad inspector and as laid upon the cars. "The very act that passed the title, and that would have incurred the tax had the transaction been domestic, committed the goods to the carrier which was to take them . . ." to their destination in another state. *A. G. Spalding & Bros. v. Edwards* (1923), 262 U. S. 66, 69.

As directly supporting our statement that the loading of ties on the cars was itself an act of interstate commerce, we cite also *Puget Sound Stevedoring Co. v. Tax Commission* (1937), 302 U. S. 90. There, a Washington statute levied a tax "for the privilege of engaging in business activities." As here, the tax was measured by gross receipts. The Stevedoring Co. was engaged in the loading and unloading of goods on ships bound to or from ports in other states and countries. The state sought to tax the receipts derived from the activity of loading freight from the dock onto the ships. The Court, by Mr. Justice Cardozo, held the tax invalid, and said:

> "No one would deny that the crew would be engaged in interstate or foreign commerce if busied in loading or unloading an interstate or foreign vessel. cf. *B. & O. S. W. R. Co. v. Burtch*, 263 U. S. 540, ... The longshoreman busied in the same task bears the same relation as the crew to the commerce that he serves. (302 U. S. at p. 92.)
>
> "The business of loading and unloading being interstate or foreign commerce, the State of Washington is not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts. Decisions to that effect are many and controlling." (302 U. S. at p. 94.)

And in *California Rice Industry v. Federal Trade Commission* (1939, C. C. A. 9), 102 F. (2d) 706, the Court said (p. 718):

"The loading 'on board' the cars, or the car or truck movement from the rice mill to the dock, constitutes the beginning of the interstate or foreign transit."

In the instant case, if the crew of the freight train had loaded the ties on the cars, no one could deny that they were engaged in interstate commerce. Similarly, under the above decision, the loading of the ties by respondent, under contracts requiring the ties to be delivered f.o.b. cars and shipped to Finney, Ohio, is no less an act of interstate commerce than was the work of the longshoremen in the above case.

e. Not important how the ties were transported. The railroad moved these ties, along with other freight, in the ordinary way as a common carrier. It assumed no control over the ties *as owner*, nor any of the incidents of possession, until the cars reached Finney, when the Chief Engineer of Maintenance for the railroad, as consignee, took them in charge and delivered them to the treatment plant.

This was a perfectly normal method of moving the ties to Finney, regardless of when title passed to the railroad. It was more convenient and less expensive than for either respondent or the railroad to employ a truck or to ship by another railroad. The railroad had facilities for handling them, and did so. *Kelly v. Rhoads*, 188 U. S. 1, 9; *Stockard v. Morgan*, 185 U. S. 27, 32. It is common practice, irrespective of where title to the goods may pass, for the buyer to determine

the method of shipment. It is also customary where a manufacturer or jobber sells goods that are to be transported to their destination by rail, to deliver the goods f.o.b. cars, and to issue bill of lading to the buyer, as consignee, precisely as respondent did here. In such cases, the buyer pays the freight. Sometimes title passes with delivery on the cars, and sometimes not. But *in every case*, if the destination is in another state, the *transaction is interstate commerce. Santa Cruz Fruit Packing Co. v. National Labor Relations Board* (1938), 303 U. S. 453, 463.

Respondent did ship the ties by rail, and did issue bills of lading accordingly, and this was done under contract and specific directions of the purchaser. Even the absence of a contract or obligation to ship out of the state "does not affect the substance of the matter when in fact such a shipment was *contemplated* and *made*." *Federal Trade Commission v. Pacific States Paper Trade Association* (1927), 273 U. S. 52, 64. That respondent paid no freight on the ties has no more effect on character of the commerce than in the ordinary case of a manufacturer or jobber selling goods into another state and shipping in the same manner.

The use of a common carrier in moving goods across state lines is not necessary to make the commerce interstate. Logs floated across by the current of a stream are in interstate commerce. *Coe v. Errol* (1886), 116 U. S. 517, 527-528. Cattle or other stock driven across, or drifting across on the open range, are

in interstate commerce. *Thornton v. United States* (1926), 271 U. S. 414, 425.

The cases cited *supra* and herein below fully support the decision of the Circuit Court of Appeals on the commerce question. As specifically declared in these cases, it is wholly unimportant, in determining the nature of the commerce—whether interstate or intrastate:

(a) where title to the commodity passes, *Santa Cruz Fruit Packing Co. v. National Labor Relations Board* (1938), 303 U. S. 453, 463; *Pennsylvania R. Co. v. Clark Bros.* (1915), 238 U. S. 456, 465-466; or

(b) whether the purchaser can use the commodity, or ship it to another destination, in the state of origin, *Dahnke-Walker Case* (1921), 257 U. S. 282, 292; *United States v. Reading Co.* (1912), 226 U. S. 324, 367; *Eureka Pipe Line Co. v. Hallanan* (1921), 257 U. S. 265, 271; or

(c) who pays the cost of transportation, *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, 303 U. S. 453, 463; or

(d) that the carrier is itself the owner of the property being transported interstate, *The Pipe Line Cases* (1914), 234 U. S. 548, 560; *United Fuel Gas Co. v. Hallanan* (1921), 257 U. S. 277, 280-281; *Standard Oil Co. v. Johnson* (1939, Cal.), 92

Pac. (2d) 470, 472-473; *United States v. Reading Co.* (1912), 226 U. S. 324, 342, 267; or

(e) that the property is for the ultimate use of the buyer, who is also the carrier, *Valvoline Oil Co. v. United States* (1939), 308 U. S. 141, 146; *O'Brien v. United States* (1923, C. C. A. 6), 290 Fed. 185, 186-187; *Standard Oil Co. v. Johnson* (1939, Cal.) 92 Pac. (2d) 470, 473, (citing U. S. Supreme Court decisions).

(2) *The tax is of the multiple type.*

It is obvious that if a tax may be imposed upon this gross income by the State of Indiana, *where it was not received*, a like tax may be imposed upon it by the State of Pennsylvania, *where it was received.* And as the commerce touches the State of Ohio by reason of the activities at and through respondent's Marietta office, a tax in substance the same, measured by the amount of gross receipts from the transactions, may with equal right be imposed by the State of Ohio. Thus, respondent's transactions in furnishing ties to the railroad may be subjected by other states to additional taxes, in substance the same, "merely because interstate commerce is being done."

In a line of decisions of this Court unbroken to this day, it has been held that a state tax upon gross receipts from interstate transactions is a *direct burden* upon the commerce itself, and is invalid. In *Gwin, White & Prince, Inc. v. Henneford* (1939), 305 U. S. 434, the Court said (p. 441):

"For more than a century, since *Brown v. Maryland*, 12 Wheat. 419, 445, it has been recognized that under the commerce clause, Congress not acting, some protection is afforded to interstate commerce against state taxation of the privilege of engaging in it. (Citing cases.) For half a century, following the decision in *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, it has not been doubted that *state taxation of local participation in interstate commerce*, measured by *the entire volume* of the commerce, is likewise foreclosed."

The multiple feature, as an element of invalidity of a state tax, was not expressly discussed until the *Western Live Stock* case, *infra;* but, as shown in citations by the Court in recent cases, the risk of multiple taxation has been present in substantially all instances where a state tax has been held invalid as applying to interstate commerce. (See authorities following citation of the *Adams* case in *Gwin, White & Prince* case, 305 U. S. 434, 439.)

In *Western Live Stock v. Bureau of Revenue* (Feb. 1938), 303 U. S. 250, the Court upheld a tax on gross receipts of a magazine derived from out-of-state advertisements. Mr. Justice Stone, after reciting varieties of state taxes that have been held valid, though affecting interstate commerce, said (pp. 255-256):

"All of these taxes in one way or another add to the expense of carrying on interstate commerce, and in that sense burden it; but they are not for that

reason prohibited. On the other hand, local taxes, *measured by gross receipts from interstate commerce*, have often been pronounced unconstitutional. The vice characteristic of those which have been held invalid is that they have placed on the commerce burdens *of such a nature as to be capable*, in point of substance, *of being imposed*, (citing cases) *or added to*, (citing cases) *with equal right by every state which the commerce touches*, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce. (Citing cases.) The multiplication of state taxes measured by the gross receipts from interstate transactions would spell the destruction of interstate commerce and *renew the barriers to* interstate trade which it was the object of the commerce clause to remove."

In *J. D. Adams Manufacturing Co. v. Storen* (May, 1938), 304 U. S. 307, the Court, in holding the Indiana tax here involved could not legally be applied to gross receipts from transactions in interstate commerce, said (pp. 311-312):

"The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, *without apportionment*, receipts derived *from activities in interstate commerce;* and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which

they are manufactured. Interstate commerce would thus be *subjected to the risk of a double tax burden to which intrastate commerce is not exposed,* and which the commerce clause forbids. We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by Article 1, Sec. 8 of the Constitution. The opinion of the State Supreme Court stresses the generality and nondiscriminatory character of the exaction, but it is settled that this will not save the tax *if it directly burdens interstate commerce.*"

In the *Gwin, White & Prince* case (Jan., 1939), 305 U. S. 434, the Court had before it a Washington state tax, measured by gross receipts, on the privilege of "business activities." The factual situation was very similar to that here, the chief difference being that the taxpayer was a marketer, selling for the producer (fruit grower), instead of acquiring title to the products it sold. In denying validity of the tax, Mr. Justice Stone, after discussing the facts, said (p. 439):

"Here the tax, measured by the entire volume of the interstate commerce in which appellant participates, *is not apportioned to its activities within the state.* If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, though nominally local, thus in its practical operation discrimi-

nates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, *the risk of a multiple burden to which local commerce is not exposed.*" (Citing the *Adams* case, and others.)

In *Dixie Ohio Express Co. v. State Revenue Commission* (1939), 306 U. S. 72, the Court said (p. 76):

"It is elementary that a State may not impose a tax on the privilege of engaging in interstate commerce." (Citing cases.)

And in *Southern Pacific Co. v. Gallagher* (Jan. 30, 1939), 306 U. S. 167, after discussing types of state taxes held valid or invalid under the commerce clause, the Court re-affirmed the multiple tax principle stated in *Western Live Stock* case and *Adams* case, as follows (pp. 174-175):

"Where a similar levy by other states may be imposed with consequent multiplicity of exaction on commerce for the same taxable event, local tax of a privilege, measured by total gross receipts from interstate transactions *is considered identical with an exaction on the commerce itself.* This rule is applicable to a tax on gross receipts from interstate transportation; an occupation tax measured by gross receipts from radio broadcasting; and a *general tax* at specified rates upon the gross income of every resident, *construed* as 'a *tax upon gross re-*

ceipts from commerce' '*without apportionment.*' . . ." (Citing cases in notes 19, 20, 21, 22, 23 and 24.)

Second. The decision of the Circuit Court of Appeals is not in conflict with decisions of this Court.

The leading decision of this Court upon this subject is *Dahnke-Walker Milling Co. v. Bondurant** (1921), 257 U. S. 282. In that case, it was the "*course of business*" in preceding years that determined the character of the commerce.

By contracts made in Kentucky, the farmer agreed to sell wheat to Dahnke-Walker and deliver it f.o.b. cars at the farmer's home town in Kentucky. The wheat was paid for there, and title passed to the buyer when it was loaded on the cars there. The seller was not authorized to ship or consign the wheat to another state or to *any* destination; the buyer itself had charge of that. There was nothing to prevent the buyer from reselling the wheat or shipping it to a destination in Kentucky. (See same case, 175 Ky. 774, 195 S. W. 139.) The making of the contract and the entire transaction of purchase and sale, including delivery, payment and transfer of title—all occurred in Kentucky; but by the course of business in prior years, the wheat was intended to go to Tennessee for treatment at the buyer's mill. It had been the practice to send it there,

*NOTE—In the *Dahnke-Walker* case, the wheat farmer, Bondurant, of Kentucky, was the seller, like respondent here. The Dahnke-Walker Milling Co., of Tennessee, was the buyer, like the railroad here.

though nothing required the buyer to do so. This was known by both parties at all times.

It was a state regulation as to suits brought by a foreign corporation, not a tax, that was involved in the *Dahnke-Walker* case, but it was necessary *first to determine the character of the commerce*—whether interstate or intrastate. This Court held it was interstate. (257 U. S. 282, at pp. 290-292.)

The case here is a stronger instance of interstate commerce than the *Dahnke-Walker* case. Here, neither party was domiciled in Indiana; the contracts and sales orders were negotiated and closed in other states; all payments were made and received outside the state; the ties were destined by contracts to Finney, Ohio; deliveries were made on board cars in Indiana, consigned by the seller to the buyer at Finney, Ohio; and the buyer could not have prevented the ties from going to Finney without violating its contract to deliver them there.

In the *Dahnke-Walker* case, the seller (the farmer) had no interest whatever in the destination of the wheat. Here, both parties had a definite contract interest in sending the ties from Indiana to Finney, Ohio, for treatment. This Court has used the *Dahnke-Walker* case unbrokenly since December 12, 1921, as stating a correct descriptive definition of interstate commerce.

In *Currin v. Wallace* (1939), 306 U. S. 1, the Court sustained validity of the Federal Tobacco Inspection

Act, although all of the tobacco inspected was sold at auction locally in North Carolina (the transaction, offering, bids, sale, delivery, passing of title, and payment—all being local), it was shown that *under the market practices involved*, the major portion of the tobacco inspected and sold was *intended* to be shipped in interstate commerce. The Court found that interstate commerce was contemplated and so upheld the Act, saying (p. 10):

> "So far as the sales are *for shipment* to other States or to foreign countries, it is idle to contend that they are not sales in interstate or foreign commerce and subject to congressional regulation. Where goods are purchased in one State *for* transportation to another, the commerce *includes the purchase* quite as much as it does the transportation. . . ." (Citing *Dahnke-Walker* case and others.)

In *Mulford v. Smith* (1939), 307 U. S. 38, the Court considered the constitutionality of applying the Agricultural Adjustment Act to the marketing of certain tobacco. The application of the act depended on whether the tobacco was marketed in interstate commerce. The Court said (pp. 47-48):

> "It (the statute) purports to be solely a regulation of interstate commerce, which it reaches and affects at the throat where tobacco enters the stream of commerce,—the marketing warehouse. . . . This Court has recently declared that sales of tobacco by growers through warehousemen to purchasers *for*

removal outside the state constitute interstate commerce." (Citing *Currin v. Wallace*, 306 U. S. 1, 10, and the *Dahnke-Walker* case, 257 U. S. 282, 290.)

In *United States v. Rock Royal Co-operative, Inc.*, (June 5, 1939), 307 U. S. 533, the interstate commerce point was involved because the price regulation in the Order was made to apply to milk produced by farmers located in states other than New York, which was sold by such farmers to "handlers" or dealers in milk located in the same state, paid for there, title passed there, and *the transaction fully completed there*, although the "*handler*" or *dealer* after paying for and *acquiring title* to the milk, shipped it into the State of New York. The Court said (pp. 568-569):

> "The challenge is to the regulation 'of the price to be paid upon the sale by a dairy farmer who delivers his milk to some country plant.' It is urged that the sale, a local transaction, is fully completed before any interstate commerce begins and that the attempt to fix the price or other elements of that incident violates the Tenth Amendment. But where commodities are bought *for use beyond state lines*, the sale is a part of interstate commerce." (Citing *Dahnke-Walker* case and others.)

And in *Valvoline Oil Co. v. United States* (1939), 308 U. S. 141, 144-145, a pipe line company again made the claim that it was not a common carrier because "it does not transport interstate other oil than that which it purchases at the well for its own use." The Court held otherwise, saying:

"Whether the oil so owned and transported was ultimately used by the carrier in its own operations or sold to others was in this connection immaterial. . . . This was covered by the pipe line decision. There it was stated that commerce is not dependent on title, 'and the fact that the oils transported belonged to the owner of the pipe line is not conclusive against the transportation being such commerce'."

During the three taxable years, respondent pursued a single and undeviating practice under the contracts and shipping instructions referred to which constituted *a course of business* whereby the ties were in fact sold *for transportation to another state*, and were so transported.

Such without question was the intent and contemplation of the parties at all times. That this constitutes interstate commerce there can be no doubt. As was said in *Foster-Fountain Pack. Co. v. Haydel* (1928), 278 U. S. 1, 10, "in determining what is interstate commerce, courts look to practical considerations and the established course of business." (Citing *Swift & Co. v. United States*, 196 U. S. 375, 398; *Shafer v. Farmers Grain Co.* (1925), 268 U. S. 189, 198-199; *Dahnke-Walker* case, 257 U. S. 282, 290, and other cases.)

In *California Rice Industry v. Federal Trade Commission* (1939, C. C. A. 9), 102 F. (2d) 716, the suit was to set aside a "cease and desist" order by the Federal Trade Commission directed against members of

the petitioner, an unincorporated association. Jurisdiction of the Commission depended on whether the marketing of the rice in question was "in" interstate commerce. The Court said (p. 718):

> "In addition to the admission of interstate shipments above italicized, the California-Japan type rice is sold by petitioners under sales contracts 'f.o.b. cars' at the mill or 'f.o.b. dock' at San Francisco, most of which is destined for points outside the state. The *loading 'on board' the cars* or the car or truck movement from the rice mill to the dock, *constitutes the beginning of the interstate or foreign transit.* Thus there are sales contracts, in which it is found to be the practice of petitioners to charge uniform, fixed prices, which, as well as the delivery to the buyers are 'in' interstate or foreign commerce." (Citing *Dahnke-Walker* case and others herein referred to.)

In *Standard Oil Co. v. Johnson, State Treas.* (1939, Cal.), 92 Pac. (2d) 470, the suit was to recover sales taxes, measured by gross receipts, paid by Oil Company to Southern Pacific Company (railroad) for fuel oil used by it in other states. The facts, in each particular, parallel the facts in the instant case. There, as here, the contracts "contemplated" movement of the oil to other states; the oil was delivered on cars of the buyer at places in California; title passed to the buyer at the loading point (as the state claims here); transportation out of the state was by the buyer, itself a common carrier, instead of by an independent common

carrier; waybills to the destination in other states were issued by the seller as the cars were loaded; and the buyer itself was the ultimate user of the oil.

The Oil Company claimed the tax was not applicable as the transactions were interstate. The state contended the sales were not in interstate commerce, because the contracts were made in California, the oil was delivered and title passed there, the buyer was the ultimate user, and the oil was transported to other states not by an independent common carrier, but by the buyer itself. The Court held the commerce was interstate, and based its decision entirely upon decisions of the United States Supreme Court, including *Dahnke-Walker* case and others cited in this brief.

Petitioners' argument on this question. Petitioners contest the value of the *Dahnke-Walker* case (257 U. S. 282, 290-292), as a precedent here, saying the thing involved in that case was not a state tax but a state regulation of foreign corporations. This is true. But in order to determine whether the state regulation was applicable to the situation, this Court had *first* to determine whether the transaction involved was intrastate commerce or interstate commerce. If the commerce was interstate, the regulation did not apply. And this Court so found.

Petitioners' contention assumes that a state tax affecting interstate commerce is not a *regulation.* Yet whenever a state tax has been held invalid under the commerce clause as a burden on interstate commerce, it was because the tax was a "regulation" under the

clause which authorizes Congress "to *regulate* commerce with foreign nations, and among the several states . . ."

Petitioners' idea is fundamentally unsound. Under the facts constituting any given activity, the transaction is either one of *interstate commerce* or it *is not*. Where the validity of a regulation is in question, the first and vital thing to determine is whether the activities affected *are* interstate or intrastate. The kind of regulation that is to be applied, or can be applied, must depend on whether there is interstate commerce or not. The *type of regulation* to be applied does not *in itself* throw any light on *whether the transaction is interstate or intrastate*. The fact that *Congress* has attempted to regulate a certain class of activities does not *per se* make them *inter*state in character; nor does the fact that a *state legislature* has undertaken to regulate the same class of activities, by tax or otherwise, *per se* make them *intra*state in character.

In every case where the Dahnke-Walker decision has been followed, it was followed *on its definition of interstate commerce*. In cases where it has been distinguished, the decision was based, *not* on the definition of interstate commerce, but on the fact that the tax was laid on a local privilege and did not touch interstate commerce. Not in one instance has the definition of interstate commerce, as stated in the Dahnke-Walker case, been criticized. And this Court in its latest decisions has used the definition unqualifiedly and without reserve, and with *no suggestion as to any limitation on its use*.

For example, in *Currin v. Wallace* (1939), 306 U. S. 1, the Court said (p. 10):

> "Where goods are purchased in one state for transportation to another the commerce includes the purchase quite as much as it does the transportation."

And in *United States v. Rock Royal Co-Operative* (1939), 307 U. S. 533, the Court said (pp. 568-569):

> "But where commodities are bought for use beyond state lines, the sale is a part of interstate commerce."

It is implicit in the words and form of these expressions that the Court treats the Dahnke-Walker difinition of interstate commerce as firmly imbedded in the law of the land.

This Court has expressly stated that the limitation imposed by the commerce clause applies *alike* to the state's taxing power and to other types of "interference"—which must include the various kinds of "regulations." In *Minnesota v. Blasius* (1933), 290 U. S. 1, after citing the Dahnke-Walker case and others as "illustrating the practical conception of interstate commerce as a flowing stream from one state to another, formed by a regular course of business," the Court said (pp. 8-9):

> "The States may not impose direct burdens upon interstate commerce, that is, *they may not regulate*

or restrain that which from its nature should be under the control of the one authority and be free from restriction save as it is governed in the manner that the national legislature constitutionally ordains. *This limitation applies to the exertion of the State's taxing power as well as to any other interference by the State with the essential freedom of interstate commerce.* States cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or *upon the receipts, as such, derived from it.*"

And as the Circuit Court of Appeals indicates in its opinion, in no instance has this Court, in determining whether interstate commerce existed or did not exist, ruled differently because the ultimate point involved related to a tax or to a regulation. Where facts like those in the Dahnke-Walker case exist, *there is* interstate commerce. The facts here make this a stronger case of interstate commerce.

In *Superior Oil Co. v. Mississippi* (1930), 280 U. S. 390, heavily relied on by petitioners, the action was by the State of Mississippi to collect a gasoline tax. The gasoline was sold by the Oil Company to packers of sea food. The transaction was complete when the gasoline was delivered at the packers' own wharf. The packers loaded the gas on their own fishing boats, carried it to fishermen in the neighborhood of Grant's Pass, Louisiana, and there sold it. The Oil Company, on making delivery to the packers at the wharf, took

back from the packers a so-called bill of lading signed by the master of the boat. This instrument recited that the oil continued to be the property of the Oil Company until delivered to packers' consignee. This was not true. Nor was there any actual consignee at the destination named in the bill of lading. The thing was simply rigged up for the purpose of trying to make interstate a transaction which was not. The seller and purchaser were both domiciled in Mississippi, and the sale, the delivery, and the payment were made in Mississippi. The pretended shipment from wharf to the fishermen was just a device to evade the tax. Mr. Justice Holmes spoke very moderately when he said "the document (bill of lading) seems to have had no other use than, as the Supreme Court of Mississippi said, to try to convert a domestic transaction into one in interstate commerce." The Court further said:

> "But here the gasoline was in the hands of the purchaser to do with as it liked, and *there was nothing that in any way committed it to sending the oil to Louisiana* except its own wishes." (28 U. S. at 395.)

In the instant case, sale of the ties was conditioned upon their being shipped to Finney, Ohio. Failure of the railroad to transport them there would have been a breach of the contracts.

Conclusion

The decision below is correct. It is fully supported by the facts and the law. There is no conflict among the circuits. There is no conflict with decisions of this Court. There is no important question of Federal law that should be decided. The petition should be denied.

Respectfully submitted,

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January 14, 1941.

APPENDIX

Statutes

Chapter 50, Indiana Acts 1933.

(Ind. Stat. Ann. (Burns) 1933, Sec. 64-2601 et seq.)

AN ACT to provide for the raising of public revenue by imposing a tax upon the receipt of gross income, to provide for the ascertainment, assessment and collection of said tax, and to provide penalties for the violation of the terms of this Act, and declaring an emergency.

Section 1. Be it enacted by the general assembly of the State of Indiana, That this Act may be cited as the "Gross Income Tax Act of 1933."

. . . .

(f) The term "gross income," except as hereinafter otherwise expressly provided, means the gross receipts of the taxpayer received as compensation for personal services, and the gross receipts of the taxpayer derived from trades, businesses or commerce, and the gross receipts proceeding or accruing from the sale of property, tangible or intangible, real or personal, or service, or any or all of the foregoing, and all receipts by reason of the investment of capital, including interest, discount, rentals, royalties, fees, commissions or other emoluments, however designated, and without any deductions on account of the costs of property sold, the cost of materials used, labor cost, interest or discount paid, or any other expense whatsoever, and without any deductions on account of losses; . . .

. . . .

Sec. 2. There is hereby imposed a tax, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the entire gross income of all residents of the State of Indiana, and upon the gross income derived from sources within the State of Indiana, of all persons and/or companies, including banks, who are not residents of the State of Indiana, but are engaged in business in this state, or who derive gross income from sources within this state, and shall be in addition to all other taxes now or hereafter imposed with respect to particular occupations and/or activities. . . .

Sec. 3. The tax hereby provided for shall be imposed at the following rates:

. . . .

(c) Upon the entire gross income of every person engaged in the business of retailing of any tangible commodity or commodities not specifically mentioned in subsection (d) of this section, one per cent.

. . . .

Sec. 6. There shall be excepted from the gross income taxable under this Act:

(a) So much of such gross income as is derived from business conducted in commerce between this state and other states of the United States, or between this state and foreign countries, to the extent to which the State

of Indiana is prohibited from taxing under the Constitution of the United States of America. . . .

Sec. 12. (a) . . . Any person improperly charged with any tax provided for under this Act, and required to pay the same, may recover the amount improperly collected, together with interest, in any proper action or suit against the department of treasury; and the circuit court of the county in which the taxpayer resides or is located shall have original jurisdiction of any action to recover any tax improperly collected. . . .

Regulations

Promulgated by Gross Income Tax Division

July 31, 1934

Article 1

Definitions

. . . .

Reg. 6. Gross Income consists of the gross receipts as hereinafter defined, from any business, together with any other moneys (not including borrowed money) or properties received from any and all other sources and from other activities, without deduction for expenses, for costs of goods sold, or amount of property left on hand.

Reg. 7. Gross Receipts. The amount received either in money or property, or both, from a transfer of possession of any tangible or intangible property, personal

service, interest, discount, rents, royalties, bonuses, fees, commissions and other emoluments however designated.

Article 2

General Scope and Application of Tax

The Gross Income Tax Act of 1933 is primarily and in effect a gross receipt tax applying to the gross receipts of every taxpayer under the Act from all sources without allowances or deductions for costs, expenses or dependents, and is therefore, in no way a net income tax. . . .

Reg. 16. Effective Date of Law. Tax shall apply to and shall be levied and collected upon all gross income received on or after the first day of May, 1933, regardless of the fact that such income was earned or became due prior to that date.

. . . .

Article 3

Income and Rates

. . . .

Reg. 21. Income from Sales. Gross income derived from sales is taxable at the following rates:

From sales made to consumer—1% (See Reg. No. 9-c).

From sales made for resale—¼ of 1% (See Reg. No. 9-d).

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Supreme Court of the United States

October Term, 1940

No. 654

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. CLIFFORD TOWNSEND, PETER F. HEIN, LAWRENCE F. SULLIVAN, as and constituting the Board of Department of Treasury of the State of Indiana,

Petitioners,

vs.

THE WOOD PRESERVING CORPORATION,

Respondent,

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT

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Supreme Court of the United States

October Term, 1940

No. 654

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, ET AL.,

Petitioners,

vs.

THE WOOD PRESERVING CORPORATION,

Respondent,

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT

Opinion Below

The opinion of the Circuit Court of Appeals is reported in 114 F. (2d) 922, and is printed in the Record at pages 70-83.

Jurisdiction

Jurisdiction was invoked under Sec. 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. A. Sec. 347. Certiorari was granted on February 3, 1941.

Title, Statute and Regulations

The title of the Indiana Gross Income Tax Act, and the pertinent provisions of the Act and regulations, are printed in the Appendix, *infra*, pp. 78-81. It was agreed in the stipulation, and carried into the findings, that material official regulations "may be judicially noticed by the Court" (F. 10, R. 48).*

Statement of the Case

The Circuit Court of Appeals in its opinion made an entirely accurate resumé of the facts as stipulated by the parties and found by the District Court (R. 70-72). The statement of "The Facts" in petitioners' brief (pp. 2-7) is not correct. There are important omissions and inaccuracies which result in presenting a case quite different from that set forth in the findings of the District Court and decided by the Circuit Court of Appeals. Respondent deems it necessary to correct this, and for that purpose submits the following summary of the facts, as stipulated and found by the District Court (R. 20-58), with a few parenthetical comments thereon by way of explanation:

Complete Condensed Statement of Facts

a. Respondent is a Delaware corporation, principal office at Pittsburgh, Pa. Branch office at Marietta, Ohio, from which its sale of ties is operated. Qualified to do business in Indiana, but maintains no office and has no property there. Has a designated agent in Indianapolis for service of process only. Has no regular agent or employee operating in the state, or

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* Note.—References in parentheses are to the findings of fact by number and to the record by page. Where used herein, F. = findings; R. = record; p. = page; l. = line; and RR. = B. & O. Railroad.

residing there. Occasionally sends an agent into the state in connection with its tie business, who travels from, and reports to, the Marietta office. District manager at Marietta goes to Indiana at periods in relation to complaints, etc., beyond the field agent's scope. (R. 20, ll. 24-31; R. 48, ll. 16-22, and ll. 28-40.)

Respondent is engaged in the preservative treatment of timbers, including railroad ties (R. 20, ll. 31-33). It controls and operates two plants—one at Green Springs, W. Va.; the other at Finney, Ohio.

Respondent is also engaged in selling raw ties to railroads. (R. 20, l. 33.)

b. Respondent has two written contracts, and an oral supplemental agreement, with the B. & O. Railroad, a Maryland corporation, main office at Baltimore, Md. (R. 22, ll. 13-16). They are:

(1) Contract with the Railroad for treatment of ties at the Finney, Ohio, plant. This is in the name of National Lumber & Creosoting Co., successor to Central Creosoting Co. (owner of the plant), and a subsidiary of and controlled by respondent. It requires the Railroad to deliver at least 600,000 ties annually to Finney for treatment. (R. 29, (c); R. 30, ll. 18-21; R. 38, ll. 10-21.)

Respondent acquired control of this contract and the plant "prior to the year 1933" (R. 38, ll. 16-19), and thereafter was in position to enforce delivery of raw ties by the Railroad to the Finney plant.

(2) Contract for 5-year lease and operation of the Green Springs plant, owned by the Railroad. (R. 22-28.) This is called the Joyce-Watkins contract. This contract provides that:

Railroad *shall send all ties it wants treated to the Green Springs plant* (R. 23, ll. 1-3). All raw ties must be, and were, treated before use, under this contract. (R. 49, ll. 28-31.)

Respondent *"agrees to sell* to the Railroad all ties produced or purchased by it originating in territory" convenient to the Railroad's lines "to the extent that the Railroad may give orders for such ties." (R. 25, ll. 40-45.)

The Railroad *shall advise respondent* from time to time in writing *of ties needed,* when they are to be delivered and price to be paid to respondent f.o.b. cars on the Railroad's tracks. (R. 26, ll. 5-10.)

Respondent *"will produce or purchase * * * the ties so ordered, and sell and deliver the same to the Railroad as ordered * * *."* (R. 26, ll. 10-15.)

Respondent's margin for expense, overhead and profit on ties purchased is limited as stated in the contract. (R. 26, l. 42, to R. 27, l. 6.) "All ties will be inspected by the Railroad's inspectors, *as loaded into the cars at point of origin.*" (R. 27, ll. 7-8.)

This contract respondent acquired by assignment from Joyce-Watkins Co. *on May 3, 1933.* (R. 28.)

(3) Supplemental agreement consisting of oral instructions, *accepted* and complied with. (R. 49, ll. 9-27.) The instructions *modified* that *provisions* of Joyce-Watkins contract *requiring the Railroad to send all its raw ties for treatment to the Green Springs plant.* (R. 23, ll. 1-3.) These instructions were:

> "You will, of course, ship all ties originating at points on the B. & O. Railroad west of the Ohio River to Finney, Ohio; and ties originating east of the Ohio River to Green Springs, W. Va." (R. 49, ll. 21-24.)

c. Pursuant to Joyce-Watkins contract, the ties were furnished on requisition orders of Railroad from time to time. (R. 26, ll. 5-10.)

These orders were made from the Railroad's *Baltimore, Md., office* to respondent's *Marietta, Ohio, office*

(R. 38, ll. 27-31), and *were acknowledged from the latter office.* (R. 38, ll. 32-35.)

(Comment. This closed the contsact as to each batch of ties. *Respondent was then bound to obtain and deliver the ties,* and *Railroad was bound to buy them.* Nothing more remained to be done but delivery, and check of the ties by the Railroad against the specifications. The sales contracts were made outside the state.)

d. All ties furnished the Railroad out of Indiana, respondent obtained by purchase from local producers who supplied the ties at convenient loading points on the Railroad.

The purchase and sale arrangements were made *interstate* between respondent's Marietta, Ohio, office and producers in Indiana. (R. 38, ll. 35-40.) On receiving requisition orders from the Railroad, respondent sent specifications and price list circulars to the producers. (R. 39.) The producers, by phone, wire or mail, informed respondent at Marietta of the quantity and kind of ties they would furnish, and of the Railroad loading point where, and the time when, they would be ready. (R. 44, ll. 17-24.)

(Comment. *This,* under the regular course of business, *constituted a closed deal* between respondent and the producers. It was *a purchase and sale contract of all ties that met specifications.* The producer was paid for all such ties, after inspection by the RR inspector.) (R. 45, ll. 16-21.)

e. When ties were ready at loading points, and freight cars were there, an inspector for Railroad and an agent of respondent sent from Marietta office met there. (R. 44, ll. 30-36.) The ties were inspected by the Railroad inspector "as loaded into the cars * * *." (R. 27, ll. 7-8.) *Loading and inspection were simultaneous.* Ties not meeting specifications were rejected.

f. After loading was completed (usually done by the producer at respondent's expense), the Railroad inspector gave respondent's agent an inspection report showing quantity and kind of ties accepted and loaded. (R. 44, ll. 25-30; R. 45, ll. 14-18.)

g. Respondent's agent made out a shipping report (R. 44, l. 37, to R. 45, l. 15), and also a *uniform type bill of lading*, showing respondent as consignor; Finney, Ohio, as the destination; and the Railroad (c/o its Chief Engineer of Maintenance), as consignee. (R. 45, ll. 26-28, and R. 48, l. 41, to R. 49, l. 5.) Copies of shipping report and bill of lading were sent to respondent's Marietta office, to its treatment plant at Finney, and to the Railroad at its Baltimore, Md., office. (R. 44, ll. 37-40, and R. 45, ll. 25-35.)

h. The car of ties was *then transported by the Railroad to the Finney, Ohio,* treatment plant. (R. 48, ll. 1-14.) No ties were ever diverted to any destination in Indiana or elsewhere. (R. 48, ll. 11-14; R. 49, ll. 25-27.)

i. Payment for ties was made from the Railroad's Baltimore office by check to respondent's Pittsburgh office. (R. 47, ll. 5-10.) No funds were ever received in Indiana. (R. 48, ll. 14-16.)

j. All ties sold the Railroad were required by the contracts to be shipped to one or the other of respondent's treatment plants. (Supra, p. 3.)

Respondent sold no ties or timbers to any one except under contract that the ties should go to one of respondent's plants for treatment. (R. 20, l. 35, to R. 21, l. 5.)

k. The above-described steps constituted the uniform course of business during all the taxable years. (R. 49, ll. 32-36.)

The Questions Presented

The statement of "contested issues" under petitioners' "Specification of Errors" (pp. 7-8) does not correctly present the questions here involved. It is based upon conclusions that are without support in the findings, and is argumentative. The questions presented, as found by the Circuit Court of Appeals (R. 73; 114 F. (2d) 922, 924-925), are correctly stated thus:

1. Whether the gross income taxes herein sought to be recovered are invalid as in violation of the due process clause of the 14th Amendment to the Federal Constitution, because laid upon a taxable event—the receipt of gross income—which occurred outside the territorial limits of Indiana and beyond the jurisdiction of the taxing authorities.

2. Whether the gross income taxes herein sought to be recovered are invalid as in violation of the due process clause of the 14th Amendment to the Federal Constitution, because laid without allocation or apportionment upon business activities both without and within the territorial limits of Indiana and, as to activities outside the state, beyond the jurisdiction of the taxing authorities.

3. Whether the gross income taxes herein sought to be recovered are invalid as in violation of the commerce clause, Article I, Section 8, of the Federal Constitution, because laid upon receipts derived from interstate commerce, constitute a direct burden upon such commerce and are of a type which subjects the commerce to the risk of multiple taxation of like kind in other states.

Each of said questions presents a separate and distinct issue, entirely independent of the others. The Circuit Court of Appeals considered each question separately, and decided each in favor of respondent.

Scope of Decision Below

The judgment of the Circuit Court of Appeals, as stated above, rests upon three separate grounds, each of which is distinct and independent of the others. If that Court was right as to any one of said grounds, its decision must, of course, be affirmed.

These separate grounds will, in the argument following, be dealt with in the same order as in the opinion of the Circuit Court of Appeals and as in petitioners' brief.

Summary of Argument

The Facts

During the taxable years 1934, 1935 and 1936, respondent, a Delaware corporation, main office at Pittsburgh, Pa., furnished cross-ties to Baltimore & Ohio Railroad Co., a Maryland corporation, main office at Baltimore, Md., under two written contracts and a supplemental agreement, all entered into outside of Indiana. One contract required the Railroad to deliver for treatment 600,000 ties annually to a treatment plant at Finney, Ohio, belonging (through a subsidiary) to respondent. The other provided, among other things, for the sale of raw ties to the railroad, delivered f.o.b. cars on the railroad's tracks; also for treatment of ties at another plant to be operated by respondent (under lease from the railroad) in West Virginia. The supplemental agreement required respondent to ship all ties delivered to the railroad in territory west of the Ohio River, including Indiana, to the plant at Finney, Ohio, for

treatment. Respondent sold the railroad no ties that were not to be treated at one or the other of its plants before use. All of respondent's tie transactions were operated out of its branch office at Marietta, Ohio.

Requisitions for ties as needed were issued from the railroad's Baltimore, Md., office, and accepted at respondent's Marietta, O., office, all by telephone or mail. (See Record references in the Statement of Facts, *supra*, pp. 4-5.) These requisition orders, arising from the above contracts, directly brought about and resulted in the delivery of the ties.

In Indiana, respondent itself produced no ties, but obtained them by telephone and mail dealings out of its Marietta office from local producers who supplied them at loading points on the railroad. When ties were ready, an inspector for the railroad, and an agent of respondent sent from respondent's office at Marietta, Ohio, met at the loading point; and as the ties were examined as to compliance with specifications, those accepted by the railroad inspector were by the respondent loaded on freight cars furnished by the railroad at the loading point. The inspection and loading were simultaneous. Respondent paid the producer only for ties accepted by the railroad.

Respondent's agent made out bills of lading, with respondent as consignor, and the railroad's Chief Engineer of Maintenance at Finney, Ohio, as consignee. As cars of ties were loaded, they were carried under these shipping directions by the railroad to Finney. On reports sent in by respondent's agent, the Marietta office mailed weekly invoices to the railroad at its Baltimore office for ties sold and delivered to it, and made monthly reports of such invoices to respondent's main office at Pittsburgh. All payments for ties were made by the railroad by check from

its Baltimore office to respondent's Pittsburgh office. These payments were deposited in respondent's Pittsburgh bank.

Respondent had no property in Indiana, maintained no office in Indiana, and no resident agent other than a statutory agent for service of process only. All management and bookkeeping functions were performed at its offices in Marietta and Pittsburg. All gross receipts on which the tax was assessed and collected were received by respondent from ties so furnished to the railroad.

There was no effort at evasion of the tax. During the entire taxable period, and prior thereto, the practices and all proceedings followed the course of business stated above and set out in detail in the Statement of Facts (*supra*, pp. 2-6), and in the findings of the court at pages of the Record indicated in such Statement.

I

The Thing Taxed

The tax imposed under the Indiana gross income tax law is an excise upon the privilege of receiving gross income. The taxable event occurs on the receipt of gross income. No tax accrues upon *the earning* of income or upon *the income becoming due*. It can be assessed only after the income has been received. (See Reg. 16, Appendix, *infra*, p. 80.)

The title of the Act limits its operation to "imposing a tax upon the receipt of gross income." Under the Constitution of Indiana, the provisions of an act can not be extended beyond the scope of the specification in the title. No state court has construed the provision of Section 2 relied upon by petitioners with reference to the title of the Act. This Court has done so in the *Adams* case (304 U. S. 307, 309).

In the administration of the Act, the provision relied on by petitioners can be, and has been, given the full effect of its purpose without the construction now claimed by petitioners. The tax actually collected from non-residents, without the interpretation of Sec. 2 now urged by petitioners, has amounted to fourteen per cent of the total tax.* And the Department of Treasury regulations in force during the taxable period here involved (Appendix, *infra*, p. 80-81) definitely reject and forbid such an interpretation.

Under the regular (and entirely normal) course of business, begun before the tax law was in effect, all payments for ties were received in Pittsburgh. These payments constitute the gross income, the privilege of receiving which was taxed. As this privilege was exercised in and protected by the State of Pennsylvania, and not the State of Indiana, the latter state is without jurisdiction to impose the tax, and the collection of such is in violation of the due process clause of the 14th Amendment. (See Argument, *infra*, pp. 13-36).

II

There Was No Apportionment

If, as contended by petitioners, the tax is imposed on the privilege of transacting the business which is the source of the income, and the taxable event is the transaction of such business, the tax is still invalid, because it is imposed on the entire receipts from the business of furnishing ties, without apportionment, although the major part of the activities that led to such receipts, and from which they are derived, occurred outside the State of Indiana. The

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* See Footnote, *infra*, pp. 20-21.

tax thus laid on proceeds from activities both within and without the state, without being limited to those proceeds which represent proper allocation or apportionment of the activities within the state alone, is invalid as in violation of the due process clause of the 14th Amendment. (See Argument, *infra*, pp. 36-49).

III.

Multiple Taxation of Interstate Commerce

The tax is invalid in any event, because it is levied on gross receipts derived from interstate commerce, exacts a percentage on the full proceeds of such commerce, and is a type of tax which, if valid, subjects the commerce to the risk of taxes similar in measure and in substance that may be imposed in any of the states which the commerce touches, and therefore violates the commerce clause of Article I, Sec. 8, of the Federal Constitution. (See Argument, *infra*, pp. 49-77).

ARGUMENT

I

The Thing Taxed Is the Privilege of Receiving Gross Income

Discussing the 1st Question Presented, and Covering Petitioners' Argument One, pp. 15-23.

First. *Necessity of determining the subject of the tax.* It is of highest importance in a tax case to determine the precise thing on which the tax is laid. This is the vital point on which the decisions turn; as, for example, in:

American Mfg. Co. v. St. Louis (1919), 250 U. S. 459, where a tax on the privilege of manufacturing, measured by gross receipts, was *upheld*, though the goods were sold in interstate commerce.

Utah Power & Light Co. v. Pfost (1932), 286 U. S. 165, where a tax on the privilege of generating electric current, measured by kilowatt hours, was *upheld*, though the current was moving in interstate commerce at the instant of generation.

Leach v. Nichols (1932), 285 U. S. 165, where in arriving at value of a net estate on which to reckon Federal estate tax, no deduction was allowed for state inheritance tax, because the state tax was construed to be laid on the right *to receive* instead of on the right *to transfer*, though, of course, the amount of estate to be taxed and the circumstances on which the tax arose were identical.

Chassanoil v. Greenwood (1934), 291 U. S. 584, where a license tax on the privilege of engaging in business of buying and selling cotton was *upheld*, though the cotton was purchased for the purpose of shipment to out-of-state customers, because the *tax was laid on a step that preceded* the beginning of *interstate commerce*.

Fisher's Blend Station, Inc., v. Tax Commission (1936), 297 U. S. 650, where a tax on the privilege of broadcasting, measured by gross receipts, was held *invalid,* because the tax was levied *on gross receipts* from *the entire operations* which included both interstate and intrastate commerce, without allocation.

Puget Sound Stevedoring Co. v. Tax Commission (1937), 302 U. S. 90, where a tax on the privilege of engaging in business activities was held *invalid* as to receipts from the *work of loading goods on ships,* because the goods were bound for out-state or out-country destinations.

J. D. Adams Mfg. Co. v. Storen (1938), 304 U. S. 307, 314, where a tax on the privilege of receiving gross income was held *invalid,* because the receipts were derived from activities interstate as well as intrastate, and there was, and could be no apportionment as to activities within the state. See comments on *Adams* case in *McGoldrick v. Berwind-White Coal Co.* (1940), 309 U. S. 33 at 57-58.

Gwin, Etc., Inc. v. Henneford (1938), 305 U. S. 434, where a Washington tax on the "privilege of engaging in business activities," measured by gross receipts, was held *invalid* as applied to the business of marketing of fruit sold in other states, because a substantial part of the activities of making such sales occurred outside the state and the tax was measured by the gross receipts from all activities without being apportioned and limited to those within the state.

Felt & Tarrant Co. v. Gallagher (1939), 306 U. S. 62, where a tax on the privilege of use was *upheld,* though the tax attached immediately upon arrival of the property in interstate commerce.

Graybar Electric Co., Inc., v. Curry (1939), 189 So. 186, affirmed 308 U. S. 513, where a tax on the privilege of engaging in the business of selling at retail was *upheld,* as the sales *activities were all within the*

state, though the goods were moved in interstate commerce.

McGoldrick v. Berwind-White Coal Co. (1940), 309 U. S. 33, where a tax on sales ("sale" being defined as "any transfer of title or possession, or both") was *upheld,* though there was interstate commerce, because delivery—mere physical "transfer of possession"—*was alone the taxable event,* and *this occurred within the state.*

Wisconsin v. J. C. Penney Co. (Oct. Term 1940, No. 46, decided Dec. 16, 1940), where a Wisconsin tax on the privilege of declaring dividends out of income derived from property located and business transacted in the state, was held *valid* as applied to dividends declared outside the state by a foreign corporation, because the tax was apportioned and limited to income actually earned from store properties owned and operated in the state.

Nelson v. Sears, Roebuck & Co. (Oct. Term, 1940, No. 255, decided Feb. 17, 1941), where an Iowa tax on the privilege of use of tangible personal property, measured by purchase price, was held *valid* because laid on a purely local activity, although the sales were in interstate commerce; and collection of the tax against the out-of-state seller was enforced because such sales were deemed a part of its general business done through operating stores in the state under a retailer's license and for which it was qualified as a foreign corporation.

Second. *The Nature of the Act.* This is the only law in the United States that levies a tax on the privilege of receiving gross income as such.

(a) *The True Interpretation.*

There is no other tax of this kind. There are many taxes where gross receipts or gross income is used as a measure for computing a tax that is laid on some other

privilege or taxable event. Here, the tax is directly on the *privilege of receiving* gross income. The entire framework of the Act is built upon this premise.

The "amount or volume" of gross income is also used as a measure in computing the tax (Appendix, Sec. 2, *infra*, p. 78). The use of gross income as a measure has, we think, confused the petitioners and led them into specious arguments; but it is the privilege of receiving the income alone that is taxed. The measure to be used for computing the tax might have been half or double the entire gross income received, or it might have been something else altogether. So that gross income, or gross receipts, as the measure, must not be confused with the privilege of receiving gross income, which is the only thing taxed. This distinction is determinative of many of the questions discussed in petitioners' brief.

In *J. D. Adams Mfg. Co. v. Storen* (1938), 304 U. S. 307, this Court compared the Gross Income Tax of Indiana with many other state taxes. It considered carefully the nature of the tax, and agreed with the Attorney General of the state that "it is a privilege tax upon the receipt of gross income" (p. 311). Against the further argument then made (supported by the same Supreme Court decisions now cited by petitioners) that the tax was also a privilege tax upon occupations or "transacting business," as petitioners now contend, the Court, in analyzing all phases of the Act, said (pp. 309-310): "Nor is it for the transaction of business, since in many instances it has the receipt of income by one who conducts no business." This refers to the fact that under the Act the incidence of the tax does not depend upon the origin of the gross income. All income *received within* the state is taxed regardless of how it is produced or what it comes from.

The Court decided that the tax is just what the title and text of the statute indicate and the regulations said about it. The Court said:

> "The title of the Act declares that it is a revenue measure imposing a tax upon 'the receipt of gross income' . . . (p. 309).
>
> The regulations issued by the Department of Treasury, pursuant to authority granted by the Act, treat the exaction as a gross receipts tax; and the Attorney General says in his brief that it is a *privilege tax upon the receipt of gross income.** We think this is a correct description. (p. 311)."

This tax is not, either in form or substance, an excise conditioned on the carrying on of business or on the location of sources of gross income. It has no relation to business as such; nor to the sources of income as such. The subjects from which come the gross receipts that are taxed show this. (See Reg. 6 and 7, Appendix, *infra*, p. 80). The only thing the tax relates to or is concerned with is gross income received in the State of Indiana, for the privilege of receiving and enjoying it is protected there.

The Amending Act of 1937 (Appendix, *infra*, p. 79) abundantly supports the above interpretation. It also completely excludes the interpretation now urged by petitioners.

The Act of 1937 incorporated a number of clarifications and changes in the original Act, most of which had been forecast by the regulations promulgated for the administration of that Act. The title of the amending statute of 1937 was a re-enactment, *verbatim*, of the title of the Act of 1933. (cf. Appendix, *infra*, p. 79, with p. 78.)

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* Note.—All italics used in this brief are ours unless otherwise stated.

The language in Section 2, however, is clarified, and plainly emphasizes that the tax is laid "upon the receipt of gross income" as limited by the wording of the title, and not upon any other privilege whatsoever.

Thus, the legislature, by incorporating in the amending act the interpretation of Section 2 of the original Act made by the Attorney General in the Adams case, and by the regulations promulgated for administration of the 1933 Act, has itself completely closed the door against petitioners' present interpretation of Section 2. (cf. footnote *Adams* case, 304 U. S. at p. 307.)

(b) *Petitioners' Interpretation.*

Petitioners in their brief now claim that the gross income tax act names "two taxable events, i.e., one for residents and another for non-residents" (pp. 20-21), and that the latter is entirely "separate and distinct" from the former (p. 18).

They seek to avoid the *Adams* case by saying the tax here is authorized by Section 2 of the Act, which reads in part:

> ". . . Such tax shall be levied upon the entire gross income of all *residents* of the State of Indiana, and upon the gross income derived from sources within the State of Indiana, of all persons and/or companies, including banks, who are *not residents* of the State of Indiana, but are engaged in business in this state, or who derive gross income from sources within this state . . ."

They say that by the last clause of this sentence non-residents are taxed upon the privilege of engaging in the business that produces or is the source of the income; and

that by attending to the details of delivering the ties, respondent is engaging in such business.

This claim can only be based upon a strict literal application of the words in Section 2 on which they rely. But such literal use is impossible. In Sections 2 and 3 the language used is that the tax is "levied" or "imposed" "*upon* the entire gross income . . ." (Appendix, *infra*, p. 78). Now, it can not literally be true that the tax is levied or imposed upon gross income. "Gross income" and "gross receipts" are property. In commercial transactions, they are the proceeds from sales. Such proceeds are always in the form of money, tangible property or credits. As such, in the possession of the owner—seller of the merchandise—they are subject to a property tax. The same is true of gross income from trusts or from any other source.

So, if the language in the Act is to be applied literally, then the law provides not an excise tax, but a *property* tax, and is invalid *in toto* under Article 10, Sec. 1, of the Indiana Constitution, which provides "for a uniform and equal rate of assessment and taxation." (See *Miles v. Department, etc.* (1935), 209 Ind. 172, 179.)

Petitioners' contention is based upon failure to understand the language and its purpose. The first clause in the sentence (quoted above) applies the tax to *residents*—those legally domiciled in Indiana. But this alone would not reach those living or engaging in business in Indiana and *receiving income* there, but *who are not legal residents*. The second clause, on which petitioners rely, was to fill this gap. It says the tax shall be levied:

> ". . . upon the gross income . . . of all persons and/or companies, including banks, who are *not* residents . . . but are engaged in business in the state, or who derive income from sources within the state."

This was to make the tax reach, and it does reach, hundreds of companies and persons who, *though not legally domiciled in Indiana,* engage in business and receive the income therefrom within the state. It also reaches non-resident individuals who, though not in business, live in the state all or part of the year and there receive income from business, rentals, trusts or other sources located in the state.

This is the function, and the only function, of the language in Section 2. So construed, it serves fully the necessary purpose it was intended to serve,* without application of the interpretation urged here.

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* Note.—In the October, 1940, issue of "Tax Facts Review" prepared and distributed to the public by the Gross Income Tax Division of Indiana Department of Treasury, the petitioners, speaking of the efficiency of this tax, said: "The gross income tax, the fourth of the new taxes and now the third largest source of public revenue in Indiana, was enacted by the state General Assembly in 1933 . . . Property tax is the largest and gasoline tax is second largest, when both state and local revenue are considered. Considering state collections only, gasoline tax is first and gross income tax is second. (p. 8.) . . . As a source of revenue the gross income tax has proven to be entirely adequate. It should be noted that gross income tax collections, by their very nature coupled closely with the general business, industry, and income reverses or prosperity, have, with the exception of one year, risen steadily since 1933. The gross income tax during the fiscal year 1939-40 produced $23,648,497.28, an all-time high." (p. 9.)

Further, in discussing "Tax Payments by Non-Residents" (p. 28), petitioners say that non-residents in 1939 paid to the State in gross income tax the sum of $3,252,549.48, "or 14.03 per cent of the total tax for that year," and also "The table below shows that revenue from this

But if the law was intended, or is construed, to reach gross income which in the normal course of business is received by non-residents at their domicile in another state, then it is an invalid attempt to do something that is legally impossible because such a tax *is beyond the sovereignty of the State of Indiana,* and constitutes an invasion of the sovereignty of another state.

But this the legislature *did not try to do,* for the real meaning of the Act gives it full range of application to gross income received in the state by non-residents without reaching to income which in the necessary course of business is received by them in other states.

At pp. 22-23 of petitioners' brief, the following appears:

> "The majority opinion in this case to support its construction of the non-resident provision makes the following statement:
>
> > 'It appears to us that the non-resident provision of the Act upon which defendants rely, was intended to apply to persons not legal residents of the State, but living, temporarily, or engaged in business in the State *and receiving income there.*' (Petitioners' italics.)
>
> But this is no justification for the construction which the Court has made. If this is all that the non-resident provision means then there was *absolutely no reason for the non-resident provision at all.*"

This statement is characteristic of petitioners' entire brief. It is, to say the least, a very improvident one, as the footnote *supra* shows.

Note continued.—

source has increased to a remarkable extent since 1933 which would indicate that residents of other states have found that Indiana's taxing policies in combination with other favorable factors offered business and industry a remarkable combination of advantages."

If the legislature had intended this to be any kind of occupation tax, or tax for the privilege of engaging in business, it could and would have said so plainly, both in title and text of the act, as was done by the legislature of Washington in the Act considered in *Puget Sound Stevedoring Co.* case (302 U. S. 90),* and other cases cited, *supra*, p. 14. But the legislature deliberately chose to enact a law that levied a tax on the privilege of receiving gross income, instead of a tax on any other type of privilege or taxable event.

In choosing to enact this law, the legislature must be presumed *to have weighed the advantages and disadvantages* of various types of taxes. It selected the gross income tax, realizing, of course, that no one type of tax can give the benefits of all and have the shortcomings of none. From the standpoint of revenue, the results have justified the choice.** It is simply an inherent weakness of the tax that it can not be laid on a non-resident who, without effort to evade, normally receives his gross income in the state of his domicile, even though such income is derived from sales of goods originating and delivered in the State of Indiana.

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* Note.—Extracts from Laws of Washington 1935, Ch. 180: From the title: "An Act relating to revenue and taxation, providing for the levy and collection of a tax or excise upon the act or privilege of engaging in business activities; . . ." From the text: "Sec. 4. From and after the first day of May, 1935, there is hereby levied and there shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be, as follows: . . ."

** Note.—See Footnote, *supra*, pp. 20-21.

This inherent defect the state must accept, just as it accepts the unusual benefits derived from this type of tax, and *just as it had to accept the inherent defect that the tax could not reach receipts from interstate commerce*—a much larger source of revenue than the occasional source here involved. And the tax can not, by construction of the Act, be changed from a tax on the privilege of receiving income to a tax on the privilege of transacting business.

Third. *No conflict with local decisions.* The decision of the court below is not in conflict with local decisions on a question of state law. On the contrary, it was required and is supported by the state court decisions.

(a) *The Title of the Act.*

The title of the Act is specific as to what the tax shall be laid on. It reads:

> "An Act to provide for the raising of public revenue by imposing a tax upon the receipt of gross income . . ." (Appendix, *infra*, p. 78.)

This is merely a short way of saying that the tax is "upon *the privilege* of receiving gross income" as it was construed by this Court in the Adams case (304 U. S. 307, at 309 and 311).

There is no ambiguity about this title. It plainly defines the particular kind of tax that the revenue is to be raised from. It directly points to a tax on the privilege of receiving gross income, and *on no other kind* of privilege. There is nothing that remotely suggests a tax on the privilege of engaging in the business that may be the source of the income. It could occur to no one, on looking at the

title, that the Act also imposed an occupation tax or a tax on the privilege of engaging in business. It gives the administrative officers no leeway of discretion in construing the provisions which follow in the text.

It is not the type of title that has been held to authorize in the text of a statute any sort of provisions that may relate to the subject. Under the Indiana Constitution only a title in broad and general terms may do that. Examples of such titles are:

> "An Act concerning town officers," *Baltimore & Ohio R. R. Co. v. Town of Whiting* (1903), 161 Ind. 228, 230; "An Act concerning highways," *Smith v. Board* (1910), 173 Ind. 364; "An Act concerning drainage," *Thorn v. Silver* (1910), 174 Ind. 504; "An Act regulating descents and the apportionment of estates," *Stiers v. Mundy* (1910), 174 Ind. 651; "An Act concerning intoxicating liquors," *Board v. Scanlan* (1912), 178 Ind. 142; "An Act concerning municipal corporations," *Marion, Etc. Co. v. Simmons* (1913), 180 Ind. 289, 290; "An Act concerning public offenses . . .," *Huffman v. State* (1933), 205 Ind. 75, 85.

The title here belongs to the class that the Supreme Court of Indiana uniformly since the adoption of the Constitution of 1851 has held to limit the scope of the act strictly to the wording of its title. Provisions not plainly indicated by the specification in such a title are invalid. The constitutional provision reads:

> "Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title." Constitution of Indiana, Art. IV, Sec. 19.

The following decisions are directly applicable:

In *Mewherter v. Price and Another* (1858), 11 Ind. 199, 201, the Court said:

> ". . . We have a statute entitled 'An act concerning promissory notes and bills of exchange,' which provides—
>
> 'That all promissory notes, bills of exchange, or other instruments of writing, signed by any person who promises to pay money, or acknowledges money to be due, or for the delivery of any specific article, or to convey property, or perform any stipulation therein mentioned, shall be negotiable by indorsement thereon, etc. . . .
>
> 'The assignee of any such instrument may, in his own name, recover against the person who made the same.' . . . We have seen that the title to the act under consideration is limited to promissory notes and bills of exchange. Its language is very explicit, and we know of no rule of construction by which it can be so extended as to embrace instruments in writing other than those which it expressly names. Hence, the title to which we have referred, cannot, in view of the constitutional provision above quoted, be held to embrace the subject of the contracts in suit; and the act itself, so far as it may, in terms, authorize their assignment, is plainly inoperative.'

In *Marion School Twp., Etc. v. Smith* (1939), 215 Ind. 586, 589-590, 592, the title of the act reads:

> "AN ACT providing for the levy of a tax to support the common schools of the state, providing for the apportionment and distribution of the money so raised, repealing all laws in conflict therewith, providing a penalty, and declaring an emergency.

The Court said:

"It has many times been said that the purposes of Section 19 of Article 4 of the State Constitution are to prevent 'log rolling' legislation; to prevent surprise, or fraud, in the Legislature by means of provisions in bills of which *the titles give no intimation;* and to apprise the people of the subject of legislation under consideration. *Moore-Mansfield, Etc., Co. v. Indianapolis, Etc., R. Co.* (1913), 179 Ind. 356; *Ule v: State* (1935), 208 Ind. 255. The Constitution of 1816 contained no such provision and the abuses that resulted therefrom are well illustrated by the following excerpt from the Report of Debates and Proceedings of the Constitutional Convention of 1850 (p. 1086):

'MR. MAGUIRE. I have heard much complaint—and there is undoubtedly some ground for the complaint—as to the manner in which legislation has sometimes been conducted in this State. I have a distinct recollection of a case somewhat similar to that referred to by the gentleman from Posey, where a section was inserted in a bill, otherwise unobjectionable, appropriating the sum of seventy-five thousand dollars for a private and local purpose. The bill had a general title, to which was added the words, 'and for other purposes.' The bill passed both branches of the Legislature, most probably without having been read through in either. It was discovered by the vigilance of Governor Noble, and sent back to the House in which it originated with his veto. On the question of its passage a second time it received but the single vote of the member by whom it was introduced. This and other cases to which reference might be made, shows the necessity of some measure to prevent their recurrence.'

. . . Conceding that the General Assembly might have exacted, as the price of such aid, that the teachers and bus drivers in school corporations accepting

the benefits of the fund should be selected or appointed by the state department, we can not believe that any such legislative intent is disclosed by the title of the act under consideration. Our doubt upon that subject is so strong as to lead us to the conviction that it was not so intended. Would a member of the General Assembly, about to vote on Chapter 167, Acts of 1933, or, would a citizen, desiring to follow the course of proposed legislation, be advised by the title of said act that it contained provisions authorizing the Department of Education to name the school teachers and bus drivers in a considerable number of the school corporations of the state? We think not. The scope of the proviso is not indicated by the title."

To the same effect are:

Moore-Mansfield Construction Co. v. Indianapolis, etc., Ry. Co. (1913), 179 Ind. 356, 367; *Crabbs v. State* (1923); 193 Ind. 248, 253-254, quoting from Sutherland Statutory Construction, Sec. 87, p. 94, and Cooley, Constitutional Limitations (6th Ed.) 178.

Petitioners gain no help from the Indiana decisions they cite. There has been no case, either in the highest or a lower court of Indiana, that remotely called for any consideration of the question here involved, or where any attempt was made, by court or counsel, to give or obtain a decision on the point.

In *Miles v. Department of Treasury* (1935), 209 Ind. 172, the suit was to enjoin an advance distribution of the Act on the ground that it was wholly unconstitutional. In holding the Act valid, all the Court had to do was to determine that the tax provided for was an excise tax, and *not a property tax* (209 Ind. 172, at 177-188). This was all the Court was called upon to do, or tried to do. The particular type of privilege on which the tax was

laid was not involved, and the Court made no attempt at precise definition.

In *Indiana Creosoting Co. v. McNutt* (1936), 210 Ind. 656, there was no issue that called for definition of the taxable event. The taxpayer *was domiciled in Indiana* and operating a creosoting plant in Indiana, and there was no contract or other obligation requiring the ties to be shipped either from or into another state. The Court merely quoted the statement in the Miles case, relied on by petitioners here, in connection with a remark that there was no attempt to lay *a property tax* on intangibles as the tax was an excise (p. 664).

In *J. D. Adams Mfg. Co. v. Storen* (1938), 304 U. S. 307, this Court had before it all decisions of the Indiana Supreme Court now cited by petitioners, including the decision there appealed from, which is the latest expression of that Court; and, as shown by its opinion, this Court considered the *title of the Act and all provisions of the text* in reaching a conclusion as to the particular privilege on which the tax is laid. The Court took the Attorney General of the state at his word (*supra*, p. 16, and *infra*, p. 31), and held the tax was laid on the privilege of receiving gross income (304 U. S. at 311).

(b) *The regulations contradict petitioners' present view as to the thing taxed.*

The regulations promulgated by petitioners, in force during the taxable period, completely refute petitioners' present contention as to the taxable event.

These regulations were printed in full in the Record (pp. 75-148) in *J. D. Adams Mfg. Co. v. Storen* (Oct. Term, 1937, No. 641; decided May 16, 1938), 304 U. S. 307. The Court considered and expressly referred to a number of

these in its opinion (pp. 311-313). In the Appendix, *infra*, pp. 80-81, the regulations pertinent to the issues here are to be found.

It is a remarkable thing that in the very complete set of regulations adopted for administration of the Act, no mention whatever is made of "two taxable events, i. e., one for residents and another for non-residents." If the law contemplated, and the Department of Treasury intended to apply, such a thing, surely it should have been specified. The taxes here involved were assessed for the years 1934, 1935 and 1936. But no part of the assessment was made until August 6, 1937—more than two years and eight months after taxes for the first year were due, and more than eight months after taxes for the last year were due (R. 21). This shows that the construction of the Act now urged by petitioners is an afterthought. The regulations confirm this.

In Art. 2, entitled *"General Scope and Application of Tax"*, the opening statement says:

> "The Gross Income Tax Act of 1933 is primarily and in effect a gross receipts tax. . . .
>
> It applies to income from sales of all kinds of property or commodities in business and in this case is measured by the gross income derived from such sales. In this respect and to this extent it operates as a sales tax. . . ." (Appendix, *infra*, p. 80.)

Here, certainly, a statement was called for as to the distinction between the things taxed in the case of a resident and in the case of a non-resident, if there was any such distinction. The unavoidable import of the above language is that the Department had no thought whatever that the Act provided for any tax other than that on the privilege of receiving gross income.

Reg. 16, in Art. 2, reads:

> "*Effective Date of Law.*—Tax shall apply to and shall be levied and collected upon all gross income received on or after the first day of May, 1933, regardless of the fact that such income *was earned* or *became due* prior to that date." (Appendix, *infra*, p. 80.)

Of course, the tax could legally be applied to gross income received after the Act went in force, because the tax is laid on the privilege of *receiving* gross income. This would apply to income received *within the state* either by residents or non-residents.

But if, as to non-residents, the thing taxed is the privilege of engaging in the business that produces such income, then the tax could not be applied to or measured by gross income *earned* from business activities *before*, but *received after* the Act went in force, because this would be taxation of a privilege *exercised before* the law went in force, and would be invalid as a retroactive tax. So, as Reg. 16 fails to exempt gross income received after the Act went in force, the source of which was business activities *engaged in prior* to the effective date of the Act, the regulation itself clearly recognizes that the thing taxed is identical as to both residents and non-residents.

In "Reg. 17, *To What the Tax Applies*", the text again called for an explanation as to any distinction between taxability of residents and non-residents. (Appendix, *infra*, p. 81.)

The statement of any rule touching difference in the tax as applied to residents and non-residents, if any such rule existed, was very definitely called for in Reg. 193, par. 8, relating to "*Sale of Tangible Personal Property*", which reads:

"Persons resident and/or domiciled in Indiana receiving proceeds from the sale of personal property in states other than Indiana will be taxable thereon unless it can be shown that such personal property is an integral part of a business regularly engaged in by such person and which has its legal situs outside of Indiana." (Appendix, *infra*, p. 81.)

The rule now urged by petitioners presents a complete counterpart of the above regulation, as it applies to the reverse situation; and, if correct, required promulgation as a part of such regulation. Their position is that, as to non-residents, the consummation of a sale of tangible property by delivery in Indiana constitutes engaging in business there, the privilege of which is taxable, the amount of tax to be measured by the gross receipts derived from the sale.

It is beyond fair question that the situation peremptorily required, in the regulations adopted pursuant to statute and to be applied by the Department during the taxable years, an explanation of the difference between taxes levied against residents and non-residents if any such difference existed.

No hint of any such difference is to be found anywhere in the regulations. This in itself is conclusive that the Department placed no such construction on the statute, and that no such construction can now legally be applied to respondent.

This conclusion is in accord with the position taken by the Attorney General in the *Adams* case, which this Court refers to in its opinion (304 U. S. at p. 311). Thus, the Attorney General there asserted (see his Summary of Oral Argument in that case, p. 2), and this Court held, that the one thing taxed under the Act is the privilege of

receiving gross income within the borders of the taxing sovereignty.

Fourth. *No conflict with decisions of this Court.* The decision of the Circuit Court of Appeals as to the nature of the Indiana gross income tax is in accord with the consistent holdings of this Court, both before and since the *Adams* case, on taxes applied to income.

In the *Adams* case, this Court dealt with the question whether the tax can be imposed on the privilege of "transacting business," as now urged. It said (304 U. S. at 310):

> "Nor is it for the transaction of business since in many instances it hits the receipt of income from one who conducts no business."

Had the Court deemed otherwise, it would have followed *American Mfg. Co. v. St. Louis* (1919), 250 U. S. 459, where, though the goods were sold in interstate commerce, the precise thing on which the tax was laid was the privilege of manufacturing in the city of St. Louis, within the state. After referring to the type of tax held valid in the *American Mfg. Co.* case, the Court said (*Adams* case, 304 U. S. at 313):

> "So far as the sale price of the goods sold in interstate commerce includes compensation for a purely intrastate activity . . . . it may be reached for local taxation by a tax on the privilege of manufacturing. . . . ."

Thus, this Court expressed a clear decision that the tax is not laid on the privilege of engaging in the business which produces and is the source of the income, but is laid only on the privilege of *receiving* such income.

In *Lawrence v. State Commission* (1932), 286 U. S. 276, the Court considered the question whether a state income

tax could be applied to income earned outside the state. In holding such income was not exempt from the state tax, the Court said (p. 281):

> "The tax, . . . is founded upon the protection afforded to the recipient of the income by the state, in his person, *in his right to receive the income*, and in his enjoyment of it when received."

And in *Graves v. New York* (1939), 306 U. S. 466, where it was held that the salary of an employee of the Home Owners' Loan Corporation was not exempt from the state income tax, the Court in discussing the character of the tax, said (p. 480):

> "It is measured by income which becomes the property of the taxpayer when received as compensation for his services; and the tax laid *upon the privilege of receiving it* is paid from his private funds and not from the funds of the Government, either directly or indirectly. The theory, which once won a qualified approval, that a tax on income is legally or economically a *tax on its source*, is *no longer tenable*. . . ."

So the taxable event did not occur in the State of Indiana, but occurred in the State of Pennsylvania, as all proceeds from plaintiff's tie business were received in Pittsburgh. It is beyond the jurisdiction of the taxing officers of Indiana, and the collection of such a tax violates the due process clause of the 14th Amendment.

> "A statute of a state which undertakes to tax things wholly beyond her jurisdiction or control conflicts with the 14th Amendment." *Safe Deposit and T. Co. v. Virginia* (1929), 280 U. S. 83, 92.

> "A tax on property and *rights* wholly beyond the confines of the state constitutes a taking thereof without due process of law." 1 *Cooley on Taxation* (4th Ed.), Sec. 94, p. 222.

In *Guaranty Trust Co. v. Virginia* (1938), 305 U. S. 19, after referring to other due process cases, the Court said (p. 23):

> "Those cases go upon the theory that the taxing power of a state *is restricted to her confines* and may not be exercised in respect of subjects beyond them. Here, the thing taxed was *receipt of income within Virginia* by a citizen residing there."

And in *Curry v. McCanless* (1939), 307 U. S. 357, the Court said (p. 366):

> "The power to tax 'is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a state extends, are objects of taxation; but those *over which it does not extend, are*, upon the soundest principles, *exempt from taxation.' McCulloch v. Maryland*, 4 Wheat. 316, 429, 4 L. ed. 579, 607."

The state clearly had no jurisdiction to lay a tax on gross income received in Pennsylvania in the regular course of business, and the tax must fall.

On the question now being considered, petitioners cite two other decisions of this Court. Both of these further illustrate the importance of determining the precise thing the tax is laid upon.

In *Equitable Life Assurance Society v. Pennsylvania* (1915), 238 U. S. 143, the tax related to premiums received by insurance companies. The company contended it was a tax on property, but the Act was construed both by the state court and this Court as levying "a tax for the privilege of doing business within the Commonwealth."

But the Indiana Gross Income Tax Act is not, and does not purport to be, a law fixing conditions for a foreign

corporation to do business. That function is performed by the Indiana General Corporations Act of 1929.

In *Wisconsin v. J. C. Penney Co.* (Dec. 16, 1940), 85 L. Ed. advance paging 222), the taxpayer was a large concern owning property in Wisconsin and engaged there in the business of operating chain stores. Its business activities were as fully integrated within the state as other store companies having their legal domicile there. The entire business activities out of which arose the dividends on which the tax was imposed were carried on in Wisconsin. The taxpayer was doing business in Wisconsin as completely as if it had been domiciled and was operating in that state alone. The tax was apportioned entirely to activities carried on within the state, and was considered by this Court as bearing a just fiscal relation to the protection, opportunities and benefits given by the state.

In the instant case, the taxpayer has no property in the State of Indiana. It has no office, warehouse or agency, and operates no business, in Indiana. The tie transactions between respondent and the B. & O. Railroad consist of activities almost entirely outside the state. Both parties to the transactions are domiciled in other states, and the contracts under which the ties were purchased and sold were entered into outside the state. The only activity of respondent to which the tax could have any possible relation was the service of its agent in making physical delivery of the ties by loading them on cars for shipment to Finney, Ohio, and reporting the same.

This activity was not of such character as even to have required respondent to qualify in the state as a foreign corporation because it was interstate commerce. *Dahnke-Walker Milling Co. v. Bondurant* (1921), 257 U. S. 282,

291, 292-293; *Vilter Mfg. Co. v. Evans* (1927), 86 Ind. App. 144; *York Mfg. Co. v. Colley, et al.* (1918), 247 U. S. 21.

Thus, the only activity here for which the state gave respondent an opportunity was not the "substantial privilege of carrying on business," as in the Wisconsin case, but only the placing of ties on cars. The amount of the tax, one per cent on the entire gross proceeds from the transactions, is an excessive exaction for the privilege of loading ties on a car in Indiana and reporting thereon. The tax bears no just "fiscal relation to the protection, opportunities and benefits given by the state."

The tax here exacted is immeasurably greater than the Wisconsin tax in relation to the benefits given by the state. Neither the incidence of the tax nor its measure is tied to that proportion of the earnings which the State of Indiana made possible, because the gross income is the result of all the activities and transactions outside of Indiana which led to the delivery.

II

The Activities Were Chiefly in Other States, and There Was No Apportionment of the Tax.

Discussing the 2nd Question Presented, and Covering Petitioners' Arguments Two and Three, pp. 23-34.

First. *The tax is invalid because there was no apportionment.*

(a) Petitioners say that the thing here taxed is not the privilege of receiving gross income, but the privilege of engaging, within the state, in a business which is the source of that income.

Let it be so accepted in considering this question. Then, unless all essential activities from which the taxed receipts arise occur within the state, there must be an apportionment. No tax measured by gross receipts can legally be imposed by a state except on such portion of such receipts as fairly represents the business activities occurring within its borders. *Gwin, White & Prince, Inc. v. Henneford* (1939), 305 U.S. 434 at 438-439; *Adams Mfg. Co. v. Storen* (1938), 304 U. S. 307 at 313-314; *McGoldrick v. Berwind-White Coal Co.* (1940), 309 U.S. 33 at 57-58; *Ford Motor Co. v. Beauchamp* (1940), 308 U.S. 331 at 337; *James v. Dravo Contracting Co.* (1937), 302 U.S. 134 at 138-139; *Dravo Contracting Co. v. James* (C.C.A. 4, Sept. 6, 1940), 114 F.(2d) 242 at 245.

Petitioners in their brief concede that "The Act clearly indicates that non-residents are to pay *only* on that portion of their income which an apportionment indicates is allocatable to business transacted in Indiana" (p. 26). This, by itself, is a complete admission of respondent's case; but petitioners seek to save their argument by insisting that the statute provides for an allocation of the gross receipts, and that in all the transactions the only revenue producing activities consisted in the delivery—loading—of ties in Indiana. The statute and the facts now to be referred to fully dispose of this contention.

Section 2 of the Act imposes the tax. Section 3 directs the manner of levy and the rate of the tax. Section 3(c), under which the tax here was levied, reads:

> "Sec. 3. The tax hereby provided for shall be imposed at the following rates: . . .
>
> (c) Upon the *entire* gross income of every person engaged in the business of retailing of any tangible commodity or commodities not specifically mentioned in

subsection (d) of this section, one per cent." (Appendix, *infra*, p. 78).

Under this "statutory command"* the taxing officials are entirely without power, under any circumstances, or at any stage, to make an assessment on anything less than the "*entire* gross income" received by the taxpayer.

Here, respondent's "entire gross income" results from, and exactly equals, the price charged and received for ties. Hence, whatever elements of cost entered into the price, whether incurred outside or inside the state, are reflected in the gross receipts that were taxed. If any part of that cost was the result of activities outside the state, such part is represented in equal ratio in the price and in the gross receipts.

It follows that if essential activities leading to the delivery and sale of ties—and the receipts therefrom—occur outside the state, there is no jurisdiction to levy a tax on such portion of the receipts as flow from such activities, and the entire tax must fall.

Petitioners recognize this. So they offer the unique idea that only the *physical work* of delivering the ties—loading

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* Note.—In their brief (p. 28) petitioners say: "I. The tax as applied to non-residents seeks to tax only that portion of their income attributable to transacting business within Indiana, ... so that any receipts representing business activities outside of Indiana should be eliminated by statutory command."

As the "entire gross income", which the statute uses to measure the amount of tax, here in large part represents "business activities outside of Indiana", this statement of petitioners admits that such portion of the gross receipts should be eliminated from the tax by "statutory command", a thing the Act makes no provision for.

them on cars—contributed to the proceeds. In their view all prior steps and transactions—negotiation of contracts, requisition orders and their acceptance, arranging with producers for ties, management, necessary exchanges of telegrams, telephone calls and mail, office functions and other overhead, all of which occurred outside of Indiana—are *merely expense items* and lead to no revenues. They ignore the fact that all activities that were necessary to bring about the sales or incurred any expense, are reflected in the price of ties, and are responsible for a portion of the proceeds.

As said by the Circuit Court of Appeals, had it not been for such outside transactions "there would have been no source of income in Indiana or elsewhere" (R. 76-77, 114 F.(2d) at 926-927). The activities outside of Indiana which led to the gross receipts from ties are not limited, as stated by petitioners, to "bookkeeping, invoicing and matters of similar character" (petitioners' brief, p. 24). For convenience, we summarize again the activities which constitute the tie transactions between respondent and the railroad:

> *Negotiation of contract* between the railroad and Joyce-Watkins Co. and *assignment* to the respondent. This contract gave the railroad exclusive right on all ties respondent produced or purchased in areas near the railroad; required respondent on demand to produce or purchase for sale to the railroad all ties available in such territory; limited respondent's margin of expense and profit on ties; authorized requisition orders; fixed methods of inspection and loading; and otherwise controlled the tie transactions. (See detailed record references, *supra*, pp. 3-4.)
>
> *Negotiation of contract* between railroad and Central Creosoting Co., and *acquisition of control* by respondent of the latter's interest in treatment plant at

Finney, Ohio. This contract required railroad to deliver 600,000 ties annually to the Finney plant for treatment. *Supplemental instructions* from railroad, agreed to and followed by respondent, that all ties originating west of the Ohio River should be shipped to the Finney plant. (See detailed record references, *supra*, pp. 3-4.)

(These contracts together *bound* respondent to furnish ties on requisition orders, and *bound* the railroad to have them shipped to Finney for treatment.)

Activities pursuant to these contracts, include the receiving of requisition orders at Marietta and acknowledgment of same, which closed the deal as to each batch of ties; making purchase of ties out of Marietta, Ohio, office by exchange of mail, phone or telegraph communications with producers in Indiana; arranging out of Marietta office to send agent of respondent to attend loading of ties in Indiana and make reports; loading of ties on cars, making out bills of lading to Finney, O., making up and sending reports, and payment to producers (which are respondent's *only activities* in the entire transactions which took place in Indiana); receiving of all reports at the Marietta and Pittsburgh offices from respondent's loading agent; performing of all office management and administrative functions connected with the transactions. (See detailed record references, *supra,* pp. 4-6.)

All the above described agreements were made outside the state. From these came the requisition orders and acceptances, also made outside of the state. These activities together led to and produced the income here taxed. Nothing else did. Thus, the series of transactions, beginning with acquisition of the contracts and ending with delivery of ties and payment for them in Pittsburgh, are inseparably bound together. See *International Text-Book Co. v. Pigg* (1910), 217 U.S. 91, 107.

That the above-described transactions incidental to obtaining these contracts and the operations under them, *outside the state,* contributed to and were reflected in the gross receipts which were taxed, can not be doubted. It is certain, as a matter of common knowledge, that such outside activities, including management and other overhead outlay, contributed materially to cost of respondent's operations, and were necessarily included in the prices of ties, and, hence, in the "entire gross income." The view of the Circuit Court of Appeals on this question is indubitably sound.

In the *Gwin, etc., Inc. case,* 305 U.S. 434, the "business activities" which the State of Washington sought to tax occurred at the Company's general office there and consisted chiefly of correspondence, management, administrative details, bookkeeping and other office functions. The Court held the tax invalid only because it was measured by gross receipts which included other activities outside the State of Washington, and there was no apportionment. This is exactly similar to the present case, except that the location of the activities is reversed. There, the activities located in the taxing state, and which could have been taxed if there had been an apportionment, were of the same character that in the case here occurred outside of the taxing state, and which petitioners say require no apportionment.

(b) *A legal and valid apportionment is impossible.* The above summary of activities in sales of ties to the railroad makes clear that it is impossible for anyone, either tax collector or taxpayer, without legislative assistance, to allocate the portion, in dollars, of gross receipts that represents activities occurring in Indiana alone.

In such cases, where no rational apportionment is possible, and where the tax statute does not itself fix a formula for making such apportionment, *no tax at all can be levied.*

Dravo Contracting Co. v. James, 114 F. (2d) 242, at 245, points 1-3. This is because there is no way to levy on the basis of state activities alone, and the state has no jurisdiction to levy a tax upon activities, or the proceeds from activities, that occur in another state.

This certainly is what the Court meant in the *Adams* case (304 U. S. 307), where, construing this Act, it said (p. 314):

> "It is because the tax, forbidden as to interstate commerce, reaches indiscriminately and *without apportionment*, the gross compensation for both interstate commerce and intrastate activities that *it must fail in its entirety* so far as applied to receipts from sales interstate."

And it must be what the Court meant in *Gwin, White & Prince, Inc. v. Henneford* (1939), 305 U. S. 434, at pp. 438-439; and in *McGoldrick v. Berwind-White Coal Co.* (1940), 309 U. S. 33, at pp. 57-58; and in *James v. Dravo Contracting Co.* (1937), 302 U. S. 134, at pp. 138-140.

In the *Dravo* case, there was in question a West Virginia statute providing for "annual privilege taxes" on "business and other activities," including the business of contracting. The tax was measured by gross receipts. Dravo had a Government contract for constructing certain dams within the state. The case was briefed and argued on whether the contractor was exempt from the tax as an instrumentality of Government. The Court, on its own initiative, pointed out that in any event the Dravo Company could not be taxed on its gross receipts derived from activities outside the state.

The Court said (pp. 138, 139):

> "*First.* As to territorial jurisdiction.—Unless the activities which are the subject of the tax were carried on within the territorial limits of West Virginia, the

State had no jurisdiction to impose the tax. Hans Rees' Sons v. North Carolina, 283 U. S. 123, 133, 134; Shaffer v. Carter, 252 U. S. 37, 57; Surplus Trading Co. v. Cook, 281 U. S. 647. The question has two aspects (1) as to work alleged to have been done outside the exterior limits of West Virginia and (2) as to work done within those limits but (a) in the bed of the rivers, . . .

It is clear that West Virginia had *no jurisdiction* to lay a tax upon respondent with *respect to this work done in Pennsylvania.* As to the material and equipment there fabricated, the business and activities of respondent in West Virginia consisted of the installation at the respective sites within that State and *an apportionment would in any event be necessary to limit the tax accordingly.* Hans Rees' Sons v. North Carolina, 283 U. S. 123, 131-132."

In *Ford Motor Co. v. Beauchamp* (1940), 308 U. S. 331, where a corporate franchise tax was upheld, this Court reaffirmed its position in the Dravo case, saying:

"James v. Dravo Contracting Co. contains nothing contrary to this view. The statute under consideration there levied a privilege tax 'equal to two per cent of the gross income of the business.' In so far as it was upon receipts in other states for work done in other states, it was conceded to be outside of the taxing powers of the statute" (p. 337).

The scope of a state's power to tax is succinctly stated by this Court in *Lawrence v. State Tax Commission* (1932), 286 U. S. 276, at 279-280, as follows:

"The Federal Constitution . . . leaves the states unrestricted in their power to tax those *domiciled* within them, so long as the tax imposed is *upon property within the state* or *on privileges enjoyed there,* and is not so palpably arbitrary or unreasonable as to infringe the 14th Amendment. Kirtland v. Hotchkiss, 100 U. S. 491, supra."

The Court re-affirmed the same principle in *Connecticut General Life Insurance Co. v. Johnson, State Treas.* (1938), 303 U. S. 77. There, the California Supreme Court construed the law imposing a tax on "gross premiums received upon . . . business done in this state" as applying to gross premiums *received in Connecticut* upon reinsurance of policies taken by other companies in California. Appellant was qualified to do business in California, and actually carried on business there. In reversing the state court, this Court said (p. 80):

> "But the limits of the state's legislative jurisdiction to tax, prescribed by the Fourteenth Amendment, are to be ascertained *by reference to the incidence of the tax upon its objects* rather than the ultimate thrust of the economic benefits and burdens of transactions within the state . . . Hence it is that a state *which controls the property and activities* within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause *denies* to the state *power to tax or regulate* the corporation's property and activities elsewhere."

Respondent operates no store, warehouse or office in Indiana, and has no property there; and what few things it does there are a part of its interstate activities and inseparably connected therewith. Its local activities are of such character that there was no requirement upon respondent to qualify in the state to do business as a foreign corporation, and do not constitute "doing business in the state" within the meaning of the decisions requiring qualification.

(c) *The burden of making an apportionment is upon the state.* The true rule may be stated thus: If the state seeks to impose a tax on receipts from activities that are partly without and partly within the state, the burden is upon the

state itself to make the apportionment, and to segregate and tax only receipts from such activities as are wholly within the state. If the state itself has made a good-faith effort to make such allocation, *then and only then* is there a burden upon the taxpayer; and that is, to show that the apportionment made by the state is unreasonable or arbitrary.

In *Hans Rees' Sons v. North Carolina* (1931), 283 U. S. 123, 133, the Court said:

> "The difficulty of making an exact apportionment is apparent and hence, *when the state has adopted* a method not intrinsically arbitrary, it will be sustained until proof is offered of an unreasonable and arbitrary application in particular cases. But the fact that the corporate enterprise is a unitary one, in the sense that the ultimate gain is derived from the entire business, does not mean that for the purpose of taxation the activities which are conducted in different jurisdictions are to be regarded as 'component parts of a single unit' so that the entire net income may be taxed in one state *regardless of the extent to which it may be derived from the conduct of the enterprise in another state.*"

The state has made no apportionment here and the statute provides for none. This relieves respondent from any burden of making an apportionment and likewise relieves it from any tax levied upon the entire receipts.

Petitioners urge as a major part of their argument on this point (petitioners' brief, pp. 11, 29) that the burden of making an apportionment falls upon the respondent merely because *respondent is plaintiff in the action.*

This is both unsound and unfair. Respondent had no alternative but to pay the tax and then sue for a refund. The statute provides this procedure as the taxpayer's remedy (see 12 (a), Appendix, p. 79). It is a complete and adequate remedy, and the taxpayer's only remedy.

Respondent could not sue to restrain petitioners from collecting the tax as a Federal Court has no jurisdiction in equity to enjoin state officials from collecting a state tax when the statute provides an adequate remedy at law. This is settled by the Judicial Code and by decisions of this Court.

Section 267 of the Judicial Code provides:

> "Suits in equity shall not be sustained in any Court of the United States in any case where a plain, adequate and complete remedy may be had at law," 28 U.S.C.A., Section 384.

In *Matthews v. Rodgers*, 284 U. S. 521, 525-526, this Court said:

> "Whenever the question has been presented, this Court has uniformly held that the mere illegality or unconstitutionality of a state or municipal tax is not in itself a ground for equitable relief in the courts of the United States. *If the remedy at law is plain, adequate, and complete, the aggrieved party is left to that remedy in the state courts,* from which the cause may be brought to this Court for review if any federal question be involved, Judicial Code, Sec. 237, U. S. C. title 28, Sec. 344, *or to his suit at law in the federal courts if the essential elements of federal jurisdiction are present.*"

It ill becomes petitioners to seek to penalize respondent for pursuing the only course that was open to protect itself from what it deemed to be an unjust and invalid tax.

Second. *There is no conflict with the decision of another Circuit Court of Appeals.*

The case of *Dravo Contracting Co. v. James*, 114 F.(2d) 242, is not in conflict with the decision here, but is in harmony with it.

The activities outside of West Virginia (the taxing state) had been segregated in the District Court, and the tax on the receipts therefrom was eliminated. There was no dispute on this, as it was required by order of this Court in 302 U. S. 134. The one question before the District Court, and appealed to the Circuit Court of Appeals for the Fourth Circuit, was whether *any tax at all* could be levied against Dravo Contracting Co., which contended the entire tax was void because no method of apportionment had been provided by statute. The Circuit Court of Appeals upheld the tax against receipts from activities occurring in West Virginia. Whatever was said in the opinion was relevant only in support of this holding, which was clearly sound.

There was a natural basis for apportionment of the tax in the Dravo case. The activities were such as to lend themselves readily to separation for the purpose of computing the tax on the receipts therefrom. The District Court did not create a formula for the apportionment—that was beyond its jurisdiction. The formula created itself, for the transactions under the contract that occurred in Pennsylvania were separately paid for in that state.

The contractor was domiciled in Pennsylvania, certain of the activities essential to the construction work in West Virginia were in the regular course of business performed in Pennsylvania, and the contractor received his payment there.

Here, substantially all of the activities leading to ultimate delivery of ties to the railroad occurred in Pennsylvania, Maryland and Ohio, and payment for *all* the activities under the contracts was made in Pennsylvania. Only a minor fraction of the time, effort and cost leading to delivery of ties occurred in Indiana. The Fourth Circuit in its opinion in the Dravo case completely supports the decision of the

Seventh Circuit on this point. The former said (114 F. (2d) at p. 245):

> "We agree with taxpayer that the court was without power to apportion its income on the basis of the cost of the activities involved in earning the income within and without the state. No such basis of apportionment is prescribed by statute; and, in the absence of statute, the court is without power to adopt it, as this is a legislative function involved in the imposition of the tax, and, therefore, not one which courts may exercise. (Citing Cases.) In cases where the tax imposed is not in its nature divisible and some part thereof is beyond the taxing power of the state and no provision is made for apportionment, the whole tax is void. Gwin, White & Prince, Inc. v. Henneford, 305 U. S. 434. Adams Mfg. Co. v. Storen, 304 U. S. 307. Bowman v Continental Oil Co., 256 U. S. 642. As said by Mr. Justice Holmes in Meyer, Auditor of the State of Oklahoma v. Wells, Fargo & Co., 223 U. S. 298, 302, 'Neither the court below nor this court can reshape the statute simply because it embraces elements that it might have reached if it had been drawn with a different measure and intent.' If, therefore, any such apportionment as was made by the court below were necessary to *separate the portion of the income which the state has jurisdiction to tax from the remainder*, the tax would unquestionably be void in its entirety."

Third. *There is no conflict with decisions of this Court.*

The cases cited by petitioners support our position instead of theirs. In *Pittsburgh Life & Trust Co. v. Young* (1916), 172 N. C. 470, 90 S. E. 568, there was no occasion for apportionment of the tax, because the entire activities from which the receipts were derived occurred in the taxing state. In *Underwood Typewriter Co. v. Chamberlain* (1920), 254 U. S. 113, and in *Bass, Ratcliff & Gretton, Ltd., v. State Tax Commission* (1924), 226 U. S. 271, the tax was not imposed

on the entire activities from which the taxed receipts were derived. Instead, on a basis provided in the taxing acts, the tax was laid only on such portion of gross receipts as fairly represented activities occurring in the taxing state.

III

The Commerce Was Interstate, and the Tax Invalid

Discussing the 3rd Question Presented, and Covering Petitioners' Argument Four (pp. 34-45)

First. Whatever may be the taxable event, the transactions here were in interstate commerce. The tax exacts a percentage on the entire proceeds from the goods sold, is a direct burden on the commerce, and is of a type that may in substance be imposed, or added to, with equal right, by every state which the commerce touches, merely because interstate commerce is being done. It is therefore invalid.

(1) *The activities here were in interstate commerce.* The contracts on which the business was based were between parties with domiciles and branch offices in different states—neither in Indiana. All the contracts contemplate interstate transactions. One, between the B. & O. Railroad and respondent as assignee (called the Joyce-Watkins contract), requires respondent to furnish ties from territory near the railroad and within economical distance from the treatment plants. Another, between the railroad and respondent's subsidiary, National Lumber & Creosoting Company, requires the railroad to send 600,000 ties each year to respondent's plant at Finney, Ohio, for treatment. And a third agreement, supplemental to the above, requires respondent to "... ship all ties originating at points on the B. & O. Railroad west of the Ohio River to Finney, Ohio. ..."

Pursuant to these contracts, as shown *infra*, a course of business in furnishing ties to the railroad was established before the tax act was in existence. The Circuit Court of Appeals correctly held that the transactions under this course of business were interstate commerce.

Petitioners merely repeat here their arguments below. They say there was nothing in the contracts which required the railroad to buy any cross-ties from respondent; that there was only an option for ties; that no sale took place until the individual ties were ascertained by inspection at the instant of delivery; that nothing required any shipment of ties interstate or otherwise; that the commerce was not interstate because the purchaser was a common carrier transporting its own property, etc.

This argument is interesting as theory, but it ignores all the realities of business operations. It also ignores facts found by the District Court.

a. The railroad was obligated by contracts to buy its ties from respondent. But if the railroad only held a right or option to buy ties, the requisition orders to respondent and the latter's acceptances created individual contracts for each batch of ties. These contracts covering separate purchases were concluded outside of Indiana, and including an obligation to ship the ties from Indiana to Finney, Ohio; and, necessarily, they were entered into before any steps were, or could have been, taken toward delivery.

Before going into the specific facts, we offer a short resumé of the realities of the situation:

The Joyce-Watkins contract, before and during the taxable period, was between two business concerns desiring to co-operate for the advantage of both. The railroad owned a treatment plant in Green Springs, W. Va., of which re-

spondent, by assignment from the original lessee, became lessee and was operating. The railroad also had a contract with respondent (as successor owner through a subsidiary) which required the railroad annually to send 600,000 ties to respondent's Finney, Ohio, plant for treatment. Both parties knew each other's business needs. Nothing was more natural or essential than that the railroad should buy ties of respondent. It would not have been normal, nor conducive to each other's interests, for the railroad to have bought its ties from outsiders. Thus, the business relationship between the parties, as well as their contracts, *compelled* the railroad to buy its ties from respondent.

The railroad was operating lines of great mileage. It *had* to have new ties. It *had* to have them *treated* for preservation. Both parties knew this when respondent became lessee of the Green Springs, W. Va., plant. In the lease contract with respondent, the railroad had agreed to deliver to the Green Springs plant "the ties and other forest products which it desires to have treated." The maintenance of its lines *compelled* the railroad to "desire" to have the ties treated (R. 23, ll. 1-7). So the actual requirements of the contract made the railroad send the raw ties to one or the other of respondent's treatment plants. The same contract *compelled* respondent to acquire, and sell and deliver to the railroad, *all ties ordered* by it in territory convenient to the railroad (R. 25, ll. 40-45; R. 26, ll. 10-15).

There can be no doubt as to what these provisions of the contracts implied under existing circumstances. They implied and required *a course of business exactly such as the parties* actually followed. And this course of business began *prior to the tax Act*. The contract of the railroad for treatment of ties at the Finney, Ohio, plant was in force since December 21, 1922, and respondent's owner-

ship (through its subsidiary) began prior to 1933. So the railroad must have been sending ties out of Indiana to the Finney plant both before and after respondent's ownership thereof and prior to 1933. (R. 29; R. 38, ll. 10-25.) This is confirmed by the natural implication of the words "of course" in the shipping directions of the railroad to respondent, after it became assignee and before it began operations under the Joyce-Watkins Green Springs contract. (R. 49, ll. 21-24.) Thus the course of business necessarily had begun before respondent stepped into it.

So, the railroad from Baltimore gave orders for ties to respondent which were acknowledged from Marietta, and thus *became definite obligations.* They were obligations which, under the contracts, required respondent to furnish and deliver, and the railroad to accept, the full number of ties ordered to the extent they complied with the railroad specifications. The "ascertainment" or "selection" at the railroad siding was nothing but *a checking against specifications*—a thing entirely customary in all lines of business before a purchase is finally accepted, however absolute may be the contract.

As to the interstate destination of the ties, the railroad had contracted, as above shown, to send all ties it desired treated under the Joyce-Watkins contract to the Green Springs plant. For convenience and economy, it modified this contract, with respondent's consent, so that respondent should ship all ties originating west of the Ohio River to the Finney, Ohio, plant, where the railroad was required to have 600,000 ties per year treated. (R. 49, ll. 9-26.) So, beyond all caviling, the contracts *did* require the Indiana ties to be shipped to Ohio, and neither the railroad nor respondent could have done anything else *without violating contract obligations.*

Pursuant thereto, and to the course of business followed thereunder, respondent did ship all ties to Finney, Ohio, as the following finding shows:

> "During the years of 1934, 1935 and 1936, none of the ties were ever carried by the Railroad Company to points in Indiana, but all ties were at all times carried to Finney, Ohio, for treatment." (R. 48, ll. 11-14. See, also, R. 48, ll. 1-11, and R. 49, ll. 9-27).

This was interstate commerce. *Dahnke-Walker Milling Co. v. Bondurant* (1921), 257 U. S. 282, 290-292; *Lemke v. Farmers' Grain Co.* (1922), 258 U. S. 50, 54-55 (citing *Dahnke-Walker* case); *Currin v. Wallace* (1939), 306 U. S. 1, 10 (citing *Dahnke-Walker* case); *Mulford v. Smith* (1939), 307 U. S. 38, 47-48 (citing *Dahnke-Walker* case); *United States v. Rock Royal Co-Operative, Inc., et al.* (1939), 307 U. S. 533, 568-569 (citing *Dahnke-Walker* case); *Valvoline Oil Co. v. United States* (1939), 308 U. S. 141, 144-145; *California Rice Industry v. Federal Trade Commission* (1939, C. C. A. 9), 102 F. (2d) 716, 718 (citing *Dahnke-Walker* case); *Standard Oil Co. v. Johnson, State Treas.* (1939, Cal.), 92 Pac. (2d) 470, 471-472 (citing *Dahnke-Walker* case).

The findings by the District Court that support the resume of facts above set forth are referred to in the condensed statement at the opening of this brief (*supra*, pp. 2-6), and are found chiefly in paragraphs b (1), (2) and (3); c; e; g; h; i; j; k. These findings will be specifically quoted from under the respective points discussed below:

b. The sales contracts were effected outside of Indiana. Petitioners urge that the sale of ties to the railroad, as well as delivery of the ties, occurred within the state. The facts contradict this view.

Under the decisions, it is wholly unimportant as to existence of interstate commerce, whether the bargain touching the sale was concluded within or without the state. However, to settle the question, the court's findings, including provisions of the contracts touching this point, will now be assembled and analyzed.

> The Joyce-Watkins contract was assigned to respondent May 3, 1933, "and all ties supplied to the Railroad Company have been supplied under that contract." (R. 29, ll. 14-22.)
>
> "The Contractor agrees to sell to the Railroad all ties produced or purchased by it originating in territory from which ties in the usual course of business would be brought to the lines of the Railroad to the extent that the Railroad may give orders to the Contractor for the purchase of such ties." (Joyce-Watkins contract, R. 25, ll. 40-46.)
>
> "The Contractor will produce or purchase from other producers the ties so ordered, and sell and deliver the same to the Railroad as ordered . . ." (Same contract, R. 26, ll. 10-15.)

Under the above clauses, the railroad could, and did, *demand* that respondent supply it with ties out of Indiana territory convenient to the railroad.

> "The Purchasing Agent of the Railroad shall advise the Contractor from time to time in writing of the quantities and kinds of ties which the Railroad will need and the time within which it desires the ties to be delivered, and the price which the Railroad is willing to pay the Contractor f.o.b. cars on the railroad's tracks." (Same contract, R. 26, ll. 5-10.)

This clause provided for *requisition orders* from time to time. As the contract covered a period of five years from March 1, 1933, naturally it authorized purchase of the ties as needed and provided for price fluctuations.

Details of performance of the Joyce-Watkins contract, and the construction placed thereon by the parties when operating thereunder, show the sales obligations did not arise in Indiana:

> "During the years in question, the following was the regular course of business: The *Railroad Company*, by telephone calls from its purchasing agent at Baltimore, Md., *advised* a representative of *the plaintiff* at its office *at Marietta, Ohio*, of the ties to be required by it for a certain period in advance, and the price which it would be willing to pay. The *oral communication of the order* of the Railroad Company for ties under the Joyce-Watkins contract *was acknowledged by agents of the plaintiff at Marietta, Ohio....*" (R. 38, ll. 26-35.)

It is plain that under the contract the requisition orders by railroad and acknowledgment thereof by respondent were intended to create, and did create, *a fixed obligation on respondent* to furnish the ties as ordered. The deal as to each batch was closed. Nothing remained to be done between respondent and the railroad, except inspection of the ties by the railroad as they were loaded by respondent. This is recognized in the ending of the above-quoted sentence, which continues: "and *thereupon* the plaintiff prepared and mailed to known producers" circulars stating specifications and prices for ties respondent was inviting them to furnish. (R. 38, l. 35, to R. 44, l. 16.)

So, even if, as petitioners contend, the railroad under the Joyce-Watkins contract had only an option to buy ties from respondent, nevertheless as each batch of ties was ordered, and the order accepted, a specific obligation arose as to such ties which was binding on both parties. And all such contracts for specific lots of ties were concluded outside of Indiana by communications between the railroad at

Baltimore and respondent at Marietta. And these firm obligations for ties were each created *before any steps whatever were taken* toward delivery of the ties. Thus, delivery was brought about as the result of contract obligations, fully completed prior to and not at the time or place of delivery.

The inspection of ties by the railroad was only for the purpose of checking the ties *to see that they came up to specifications.*

The foregoing extracts from the findings show conclusively that all *sales obligations* for ties were concluded entirely outside of Indiana. Consummation *by delivery* of the ties on board cars was a subsequent step, and took place in Indiana.

c. The contracts required interstate shipment of the ties. The findings plainly show that from the time operations under the contracts began, all ties originating west of the Ohio River were, at the instant requisition for them was made, definitely destined for shipment to Finney. Failure to ship them there would have been *violation of its contract* by respondent. Failure to transport them there would have been *violation of its contract* by the railroad.

There can be no mistaking the significance of the following findings and contract provisions:

> "All of the ties furnished by plaintiff to the Baltimore & Ohio Railroad Company under the Joyce-Watkins contract during the years 1934, 1935 and 1936 were treated before use by the Railroad Company." (R. 49, ll. 28-31.)

> "The Railroad agrees to deliver to the Contractor on cars at the treating plant the ties and other forest

products which it desires to have treated." (Joyce-Watkins contract, R. 23, ll. 1-3.)

As all ties *required* preservative treatment before use, the above clause is a *definite agreement* by the railroad to send *all* ties to respondent's treatment plant at Green Springs, W. Va. To save distance in shipping, this was later modified to send ties originating west of the Ohio River *to Finney, Ohio.*

The shipping instructions, which constitute the supplemental agreement modifying the destination of ties originating west of the Ohio River (Statement of Facts, *supra*, par. *b* (3), p. 4), are:

"You will, of course, ship all ties originating at points on the B. & O. Railroad west of the Ohio River to Finney, Ohio; and ties originating east of the Ohio River to Green Springs, W. Va." (R. 49, ll. 21-24.)

And the instructions were accepted and followed:

"These instructions relative to shipment of ties were accepted and carried out by plaintiff during the years 1934, 1935 and 1936." (R. 49, ll. 25-27.)

Except for the other contract which required the railroad to deliver 600,000 ties per year to respondent's Finney plant for treatment, which made respondent willing for the ties to go to Finney, it could, under the Joyce-Watkins contract, *have compelled* the railroad to send the ties originating in Indiana *to Green Springs, W. Va.*, for treatment. And this also would have been a transaction in interstate commerce.

This is confirmed by the following finding:

"It (the respondent) does not, however, sell ties or timbers to any one other than to those with whom

it has a contract to treat such ties or timbers, nor does it produce or purchase ties or timbers for sale to any one other than to persons or corporations with whom it has a contract to treat the ties or timbers, and does treat the ties and timbers so produced and purchased." (R. 20, l. 35, to R. 21, l. 5.)

d. The course of business, pursuant to the contracts, was interstate commerce. The following findings show that by uniform practice both seller and buyer of the ties followed the mandate of the contracts to ship the ties to Finney, Ohio:

"When the ties were ready at a loading point, an inspector of the plaintiff and of the Baltimore & Ohio Railroad Co. would go to the loading point, and all ties accepted by the Railroad Company's inspector were loaded by the producer on cars of the railroad." (R. 44, ll. 30-35.)

"At the end of each day's loading of ties along the right of way of the Railroad in Indiana, the ties were billed by plaintiff's agent in the name of Wood Preserving Corporation, as shipper, to the Baltimore & Ohio Railroad, in care of the person who was at the time Chief Engineer of Maintenance at Finney, Ohio." (R. 48, l. 41, to R. 49, l. 2.)

"One copy of the shipping report, together with the billing of cars, was sent forward to the Finney, Ohio, treatment plant and to the Baltimore, Md., office of the Railroad Company." (R. 45, ll. 26-30.)

"All of the ties originating in Indiana during the years of 1934, 1935 and 1936 were delivered to the Railroad Company f.o.b. cars at points of origin within Indiana, were carried by the Railroad Company from the point of origin in Indiana to the Finney, Ohio, treating plant, and there yarded, seasoned and treated pursuant to the Central Creosoting contract. . . ." (R. 48, ll. 1-7.)

The above findings tell their own story without discussion, and prove conclusively that the course of business followed in shipping ties to Finney, Ohio, was *pursuant to contract agreements* and constitutes interstate commerce.

e. Loading the ties was interstate commerce. The contract provision as to delivery is as follows:

> "All ties will be inspected by the Railroad's inspectors, as loaded into cars at the point of origin." (R. 27, ll. 7-8.)

Title to the ties passed to the railroad either at the loading point in Indiana, or when they reached the Chief Engineer of Maintenance at Finney, Ohio—it is not important which. In the *Dahnke-Walker* case, 257 U. S. 282, 290-292 (see discussion of this case, *infra*, pp. 68, 73), title to the farmer's wheat passed when he delivered it f.o.b. cars at his home town in Kentucky, and before it started to its destination in Tennessee. There the wheat was intended to go to Tennessee, but the farmer did not pay the cost of transportation. Here the ties were contracted to go to Ohio, but the seller did not pay the cost of transportation.

Ties waiting at the loading point belonged to the producer until accepted as to specifications by the railroad. Respondent paid for and acquired no ties except those accepted by the railroad inspector.

When the parties were ready for a loading, they went to the pile of ties, with a car standing by, and as the railroad inspector examined the ties, each tie accepted by him was *instantly* loaded on the car. Respondent did not acquire title till then. Assuming that title passed

from respondent to the railroad when the ties were laid on the cars, it was coincident with the delivery.

After the ties were acquired by respondent, they *did not come to rest in Indiana.* They were on their way to Finney, Ohio, and in interstate commerce, at the instant of approval by the railroad inspector and as laid upon the cars.

> "The very act that passed the title, and that would have incurred the tax had the transaction been domestic, committed the goods to the carrier which was to take them . . ." to their destination in another state. *A. G. Spalding & Bros. v. Edwards* (1923), 262 U. S. 66, 69.

Also directly supporting our statement that the loading of ties on the cars was itself an act of interstate commerce, is *Puget Sound Stevedoring Co. v. Tax Commission* (1937), 302 U. S. 90. There, a Washington statute levied a tax "for the privilege of engaging in business activities." As here, the tax was measured by gross receipts. The Stevedoring Co. was engaged in the loading and unloading of goods on ships bound to or from ports in other states and countries. The state sought to tax the receipts derived from the activity of loading freight from the dock onto the ships. The Court, by Mr. Justice Cardozo, held the tax invalid, and said (pp. 92, 94):

> "No one would deny that the crew would be engaged in interstate or foreign commerce if busied in loading or unloading an interstate or foreign vessel. cf. *B. & O. S. W. R. Co. v. Burtch*, 263 U. S. 540. The longshoreman busied in the same task bears the same relation as the crew to the commerce that he serves.
>
> "The business of loading and unloading being interstate or foreign commerce, the State of Washington is

not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts. Decisions to that effect are many and controlling."

And in *California Rice Industry v. Federal Trade Commission* (1939, C. C. A. 9), 102 F. (2d) 716, the Court said (p. 718):

"The loading 'on board' the cars, or the car or truck movement from the rice mill to the dock, constitutes the beginning of the interstate or foreign transit."

In the case here, if the crew of the freight train had loaded the ties on the cars, no one could deny that they were engaged in interstate commerce. Similarly, under the above decision, the loading of ties by respondent, under contracts requiring the ties to be delivered f.o.b. cars and shipped to Finney, Ohio, is no less an act of interstate commerce than was the work of the longshoremen.

f. Not important how the ties were transported. The railroad moved these ties, along with other freight, in the ordinary way as a common carrier. It assumed no control over the ties *as owner*, nor any of the incidents of possession, until the cars reached Finney, when the Chief Engineer of Maintenance for the railroad, as consignee, took them in charge and delivered them to the treatment plant.

This was a perfectly normal method of moving the ties to Finney, regardless of when title passed to the railroad. It was more convenient and less expensive than for either respondent or the railroad to employ a truck or to ship by another railroad. The railroad had facilities for handling them, and did so. *Kelly v. Rhoads*, 188 U. S. 1, 9; *Stockard v. Morgan*, 185 U. S. 27, 32. It is common practice, irrespective of where title to the goods may pass, for the buyer to determine the method of shipment. It is also customary

where a manufacturer or jobber sells goods that are to be transported to their destination by rail, to deliver the goods f.o.b. cars, and to issue bill of lading to the buyer, as consignee, precisely as respondent did here. (R. 48, ll. 43-46, to R. 49, ll. 1-5.) In such cases, the buyer pays the freight. Sometimes title passes with delivery on the cars, and sometimes not. But *in every case*, if the destination is in another state, the *transaction is interstate commerce. Santa Cruz Fruit Packing Co. v. National Labor Relations Board* (1938), 303 U. S. 453, 463.

Respondent did ship the ties by rail, and did issue bills of lading accordingly, and this was done under contract and specific directions of the purchaser. Even the absence of a contract or obligation to ship out of the state "does not affect the substance of the matter when in fact such a shipment was *contemplated* and *made*." *Federal Trade Commission v. Pacific States Paper Trade Association* (1927), 273 U. S. 52, 64. That respondent paid no freight on the ties has no more effect on character of the commerce than in the ordinary case of a manufacturer or jobber selling goods into another state and shipping in the same manner.

The use of a common carrier in moving goods across state lines is not necessary to make the commerce interstate. Logs floated across by the current of a stream are in interstate commerce. *Coe v. Errol* (1886), 116 U. S. 517, 527-528. Cattle or other stock driven across, or drifting across on the open range, are in interstate commerce. *Thornton v. United States* (1926), 271 U. S. 414, 425.

The cases cited *supra* and herein below fully support the decision of the Circuit Court of Appeals on the commerce question. As specifically declared in these cases, it is

wholly unimportant, in determining the nature of the commerce:

(a) where title to the commodity passes, *Santa Cruz Fruit Packing Co. v. National Labor Relations Board* (1938), 303 U. S. 453, 463; *Pennsylvania R. Co. v. Clark Bros.* (1915), 238 U. S. 456, 465-466; cf. *Nelson v. Sears Roebuck Co.*, Oct. Term, 1940, No. 255, decided February 17, 1941; or

(b) whether the purchaser can use the commodity, or ship it to another destination, in the state of origin, *Dahnke-Walker Case* (1921), 257 U. S. 282, 292; *United States v. Reading Co.* (1912), 226 U. S. 324, 367; *Eureka Pipe Line Co. v. Hallanan* (1921), 257 U. S. 265, 271; or

(c) who pays the cost of transportation, *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, 303 U. S. 453, 463; or

(d) that the carrier is itself the owner of the property being transported interstate, *The Pipe Line Cases* (1914), 234 U. S. 548, 560; *United Fuel Gas Co. v. Hallanan* (1921), 257 U. S. 277, 280-281; *Standard Oil Co. v. Johnson* (1939, Cal.), 92 Pac. (2d) 470, 472-473; *United States v. Reading Co.* (1912), 226 U. S. 324, 342, 367; or

(e) that the property is for the ultimate use of the buyer, who is also the carrier, *Valvoline Oil Co. v. United States* (1939), 308 U. S. 141, 146; *O'Brien v. United States* (1923, C. C. A. 6), 290 Fed. 185, 186-187; *Standard Oil Co. v. Johnson* (1939, Cal.), 92 Pac. (2d) 470, 473, (citing U. S. Supreme Court decisions).

(2) *The tax is of the multiple type.*

It is obvious that if a tax may be imposed upon this gross income by the State of Indiana, *where it was not received*, a like tax may be imposed upon it by the State of Pennsylvania, *where it was received.*

And as the commerce touches the State of Ohio by reason of the activities at and through respondent's Marietta office, a tax in substance the same, measured by the amount of gross receipts from the transactions, may with equal right be imposed by the State of Ohio. For example, Ohio could impose a tax on the privilege of engaging in "business activities"; or it might impose a tax against the railroad on "the receipt" of the ties at Finney, or, if title passed there, against respondent, cf. *J. Bacon & Sons v. Martin* (1939), 305 U. S. 380; or either Indiana or Ohio may impose a tax for the privilege of transit, measured by the price of the ties. And Ohio has a three per cent use tax which the railroad must pay on the ties after they arrive at Finney, which, if the tax here is valid, makes the commerce subject to multiple taxe merely because it is interstate.

Thus, respondent's transactions in furnishing ties to the railroad may be subjected by other states to additional taxes, in substance the same, "merely because interstate commerce is being done."

In a line of decisions of this Court unbroken to this day, it has been held that a state tax upon gross receipts from interstate transactions is a *direct burden* upon the commerce itself, and is invalid. In *Gwin, Etc., Inc. v. Henneford* (1939), 305 U. S. 434, the Court said (p. 441):

> "For more than a century, since *Brown v. Maryland*, 12 Wheat. 419, 445, it has been recognized that under the commerce clause, Congress not acting, some protection is afforded to interstate commerce against state taxation of the privilege of engaging in it. (Citing cases.) For half a century, following the decision in *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, it has not been doubted that *state taxation of local participation in interstate com-*

merce, measured by *the entire volume* of the commerce, is likewise foreclosed."

The multiple feature, as an element of invalidity of a state tax, was not expressly discussed until the *Western Live Stock* case, *infra;* but, as shown in citations by the Court in recent cases, the risk of multiple taxation has been present in substantially all instances where a state tax has been held invalid as applying to interstate commerce. (See authorities following citation of the *Adams* case in *Gwin, Etc., Inc.*, case, 305 U. S. 434, 439.)

In *Western Live Stock v. Bureau of Revenue* (Feb. 1938), 303 U. S. 250, the Court upheld a tax on gross receipts of a magazine derived from out-of-state advertisements. Mr. Justice Stone, after reciting varieties of state taxes that have been held valid, though affecting interstate commerce, said (pp. 255-256):

"All of these taxes in one way or another add to the expense of carrying on interstate commerce, and in that sense burden it; but they are not for that reason prohibited. On the other hand, local taxes, *measured by gross receipts from interstate commerce*, have often been pronounced unconstitutional. The vice characteristic of those which have been held invalid is that they have placed on the commerce burdens *of such a nature as to be capable*, in point of substance, *of being imposed*, (citing cases) *or added to*, (citing cases) *with equal right by every state which the commerce touches*, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce. (Citing cases.) The multiplication of state taxes measured by the gross receipts from interstate transactions would spell the destruction of interstate commerce and *renew the barriers to* interstate trade which it was the obect of the commerce clause to remove."

In *J. D. Adams Manufacturing Co. v. Storen* (May, 1938), 304 U. S. 307, the Court, in holding the Indiana tax here involved could not legally be applied to gross receipts from transactions in interstate commerce, said (pp. 311-312):

> "The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, *without apportionment*, receipts derived *from activities in interstate commerce*, and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be *subjected to the risk of a double tax burden to which intrastate commerce is not exposed*, and which the commerce clause forbids. We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by Article 1, Sec. 8 of the Constitution. The opinion of the State Supreme Court stresses the generality and nondiscriminatory character of the exaction, but it is settled that this will not save the tax *if it directly burdens interstate commerce.*"

In the *Gwin, Etc., Inc.* case (Jan., 1939), 305 U. S. 434, the Court had before it a Washington state tax, measured by gross receipts, on the privilege of "business activities." The factual situation was very similar to that here, the chief difference being that the taxpayer was a marketer, selling for the producer (fruit grower), instead of acquiring title to the products it sold. In denying validity of the tax, Mr. Justice Stone, after discussing the facts, said (p. 439):

> "Here the tax, measured by the entire volume of the interstate commerce in which appellant participates, *is not apportioned to its activities within the state.*

If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, though nominally local, thus in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, *the risk of a multiple burden to which local commerce is not exposed.*" (Citing the *Adams* case, and others.)

In *Dixie Ohio Express Co. v. State Revenue Commission* (1939), 306 U. S. 72, the Court said (p. 76):

"It is elementary that a State may not impose a tax on the privilege of engaging in interstate commerce." (Citing cases.)

And in *Southern Pacific Co. v. Gallagher* (Jan. 30, 1939), 306 U. S. 167, after discussing types of state taxes held valid or invalid under the commerce clause, the Court reaffirmed the multiple tax principle stated in *Western Live Stock* case and *Adams* case, as follows (pp. 174-175):

"Where a similar levy by other states may be imposed with consequent multiplicity of exaction on commerce for the same taxable event, local tax of a privilege, measured by total gross receipts from interstate transactions *is considered identical with an exaction on the commerce itself.* This rule is applicable to a tax on gross receipts from interstate transportation; an occupation tax measured by gross receipts from radio broadcasting; and a *general tax* at specified rates upon the gross income of every resident, *construed* as 'a *tax upon 'gross receipts* from commerce' *'without apportionment.'* . . ." (Citing cases in notes 19, 20, 21, 22, 23 and 24.)

Second. ***There is no conflict with decisions of this Court.***

The leading decision of the Court upon this subject is *Dahnke-Walker Milling Co. v. Bondurant** (1921), 257 U. S. 282. In that case, it was the *"course of business"* in preceding years that determined the character of the commerce.

By contracts made in Kentucky, the farmer agreed to sell wheat to Dahnke-Walker and deliver it f.o.b. cars at the farmer's home town in Kentucky. The wheat was paid for there, and title passed to the buyer when it was loaded on the cars there. The seller was not authorized to ship or consign the wheat to another state or to *any* destination; the buyer itself had charge of that. There was nothing to prevent the buyer from re-selling the wheat or shipping it to a destination in Kentucky. (See same case, 175 Ky. 774, 195 S. W. 139.) The making of the contract and the entire transaction of purchase and sale, including delivery, payment and transfer of title—all occurred in Kentucky; but by the course of business in prior years, the wheat was intended to go to Tennessee for treatment at the buyer's mill. It had been the practice to send it there, though nothing required the buyer to do so. This was known by both parties at all times.

It was a state regulation as to suits brought by a foreign corporation, not a tax, that was involved in the *Dahnke-Walker* case, but it was necessary *first to determine the*

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* NOTE.—In the *Dahnke-Walker* case, the wheat farmer, Bondurant, of Kentucky, was the seller, like respondent here. The Dahnke-Walker Milling Co., of Tennessee, was the buyer, like the railroad here.

character of the commerce—whether interstate or intrastate. This Court held it was interstate. (257 U. S. 282, at pp. 290-292.)

The case here is a stronger instance of interstate commerce than the *Dahnke-Walker* case. Here, neither party was domiciled in Indiana; the contracts and sales orders were negotiated and closed in other states; all payments were made and received outside the state; the ties were destined by contracts to Finney, Ohio; deliveries were made on board cars in Indiana, consigned by the seller to the buyer at Finney, Ohio; and the buyer could not have diverted the ties from going to Finney without violating its contract to deliver them there. In the *Dahnke-Walker* case, the seller (the farmer) had no interest whatever in the destination of the wheat. Here, both parties had a definite contract interest in sending the ties from Indiana to Finney, Ohio, for treatment.

This Court has used the *Dahnke-Walker* case unbrokenly since December 12, 1921, as stating a correct descriptive definition of interstate commerce:

In *Currin v. Wallace* (1939), 306 U. S. 1, the Court sustained validity of the Federal Tobacco Inspection Act, although all of the tobacco inspected was sold at auction locally in North Carolina (the transaction, offering, bids, sale, delivery, passing of title, and payment—all being local), it was shown that *under the market practices involved*, the major portion of the tobacco inspected and sold was *intended* to be shipped in interstate commerce. The Court found that interstate commerce was contemplated and so upheld the Act, saying (p. 10):

> "So far as the sales are *for shipment* to other States or to foreign countries, it is idle to contend that they are not sales in interstate or foreign commerce and

> subject to congressional regulation. Where goods are purchased in one State *for* transportation to another, the commerce *includes the purchase* quite as much as it does the transportation. . . ." (Citing *Dahnke-Walker* case and others.)

In *Mulford v. Smith* (1939), 307 U. S. 38, the Court considered the constitutionality of applying the Agricultural Adjustment Act to the marketing of certain tobacco. The application of the act depended on whether the tobacco was marketed in interstate commerce. The Court said (pp. 47-48):

> "It (the statute) purports to be solely a regulation of interstate commerce, which it reaches and affects at the throat where tobacco enters the stream of commerce—the marketing warehouse. . . . This Court has recently declared that sales of tobacco by growers through warehousemen to purchasers for *removal outside the state* constitute interstate commerce." (Citing *Currin v. Wallace*, 306 U. S. 1, 10, and the *Dahnke-Walker* case, 257 U. S. 282, 290.)

In *United States v. Rock Royal Co-operative, Inc.* (June 5, 1939), 307 U. S. 533, the interstate commerce point was involved because the price regulation in the Order was made to apply to milk produced by farmers located in states other than New York, which was sold by such farmers to "handlers" or dealers in milk located in the same state, paid for there, title passed there, and *the transaction fully completed there,* although the *"handler"* or *dealer* after paying for and *acquiring title* to the milk, shipped it into the State of New York. The Court said (pp. 568-569):

> "The challenge is to the regulation 'of the price to be paid upon the sale by a dairy farmer who delivers his milk to some country plant.' It is urged that the

> sale, a local transaction, is fully completed before any interstate commerce begins and that the attempt to fix the price or other elements of that incident violates the Tenth Amendment. But where commodities are bought *for use beyond state lines*, the sale is a part of interstate commerce." (Citing *Dahnke-Walker* case and others.)

And in *Valvoline Oil Co. v. United States* (1939), 308 U. S. 141, 144-145, a pipe line company again made the claim that it was not a common carrier because "it does not transport interstate other oil than that which it purchases at the well for its own use." The Court held otherwise, saying:

> "Whether the oil so owned and transported was ultimately used by the carrier in its own operations or sold to others was in this connection immaterial. . . . This was covered by the pipe line decision. There it was stated that commerce is not dependent on title, 'and the fact that the oils transported belonged to the owner of the pipe line is not conclusive against the transportation being such commerce.'"

During the three taxable years, respondent pursued a single and undeviating practice under the contracts and shipping instructions referred to which constituted *a course of business* whereby the ties were in fact sold *for transportation to another state*, and were so transported.

Such without question was the intent and contemplation of the parties at all times. That this constitutes interstate commerce there can be no doubt. As was said in *Foster-Fountain Pack. Co. v. Haydel* (1928), 278 U. S. 1, 10, "in determining what is interstate commerce, courts look to practical considerations and the established course of business." (Citing *Swift & Co. v. United States*, 196 U. S. 375, 398; *Shafer v. Farmers Grain Co.* (1925), 268 U. S.

189, 198-199; *Dahnke-Walker* case, 257 U. S. 282, 290, and other cases.)

In *California Rice Industry v. Federal Trade Commission* (1939, C. C. A. 9), 102 F. (2d) 716, the suit was to set aside a "cease and desist" order by the Federal Trade Commission directed against members of the petitioner, an unincorporated association. Jurisdiction of the Commission depended on whether the marketing of the rice in question was "in" interstate commerce. The Court said (p. 718):

> "In addition to the admission of interstate shipments above italicized, the California-Japan type rice is sold by petitioners under sales contracts 'f.o.b. cars' at the mill or 'f. o. b. dock' at San Francisco, most of which is destined for points outside the state. The *loading 'on board' the cars* or the car or truck movement from the rice mill to the dock, *constitutes the beginning of the interstate or foreign transit.* Thus there are sales contracts, in which it is found to be the practice of petitioners to charge uniform, fixed prices, which, as well as the delivery to the buyers are 'in' interstate or foreign commerce." (Citing *Dahnke-Walker* case and others herein referred to.)

In *Standard Oil Co. v. Johnson, State Treas.* (1939, Cal.), 92 Pac. (2d) 470, the suit was to recover sales taxes, measured by gross receipts, paid by Oil Company to Southern Pacific Company (railroad) for fuel oil used by it in other states. The facts, in each particular, parallel the facts in the instant case. There, as here, the contracts "contemplated" movement of the oil to other states; the oil was delivered on cars of the buyer at places in California; title passed to the buyer at the loading point (as the state claims here); transportation out of the state was by the buyer, itself a common carrier, instead of by an independ-

ent common carrier; waybills to the destination in other states were issued by the seller as the cars were loaded; and the buyer itself was the ultimate user of the oil.

The Oil Company claimed the tax was not applicable as the transactions were interstate. The state contended the sales were not in interstate commerce, because the contracts were made in California, the oil was delivered and title passed there, the buyer was the ultimate user, and the oil was transported to other states not by an independent common carrier, but by the buyer itself. The Court held the commerce was interstate, and based its decision entirely upon decisions of the United States Supreme Court, including *Dahnke-Walker* case and others cited in this brief.

Third. *Petitioners' argument on the commerce question.*

Petitioners contest the value of the *Dahnke-Walker* case (257 U. S. 282, 290-292), as a precedent here, saying the thing involved in that case was not a state tax but a state regulation of foreign corporations. This is true. But in order to determine whether the state regulation was applicable to the situation, this Court had *first* to determine whether the transaction involved was intrastate commerce or interstate commerce. If the commerce was interstate, the regulation could not apply. And this Court so found.

Petitioners' contention assumes that a state tax affecting interstate commerce is not a *regulation*. Yet whenever a state tax has been held invalid under the commerce clause as a burden on interstate commerce, it was because the tax was a "regulation" under the clause which author-

izes Congress "to *regulate* commerce with foreign nations, and among the several states . . ."

Petitioners' idea is fundamentally unsound. Under the facts constituting any given activity, the transaction is either one of *interstate commerce* or it *is not.* Where the validity of a regulation is in question, the first and vital thing to determine is whether the activities affected *are* interstate or intrastate. The kind of regulation that is to be applied, or can be applied, must depend on whether there is interstate commerce or not. The *type of regulation* to be applied does not *in itself* throw any light on *whether the transaction is interstate or intrastate.* The fact that *Congress* has attempted to regulate a certain class of activities does not *per se* make them *inter*state in character; nor does the fact that a *state legislature* has undertaken to regulate the same class of activities, by tax or otherwise, *per se* make them *intra*state in character.

A transaction, the facts of which constitute interstate commerce, *is interstate commerce.* Whether it is thought of in relation to a tax or to a regulation, it is still interstate commerce. Whether the transaction is viewed from one point or another, it continues the same—interstate commerce—and all the volumes of argument make it no different. Whether a state tax or a regulation can be applied to it may depend on other considerations, but if applicable, it is not because the transaction fails to be interstate commerce.

In every case where the *Dahnke-Walker* decision has been followed, it was followed *on its definition of interstate commerce.* In cases where it has been distinguished, the decision was based, *not* on the definition of interstate commerce, but on the fact that the tax was laid on a local privilege and did not touch interstate commerce. Not in

one instance has the definition of interstate commerce, as stated in the *Dahnke-Walker* case, been criticized. And this Court in its latest decisions has used the definition unqualifiedly and without reserve, and with *no suggestion as to any limitation on its use.*

For example, in *Currin v. Wallace* (1939), 306 U. S. 1, the Court said (p. 10):

> "Where goods are purchased in one state for transportation to another the commerce includes the purchase quite as much as it does the transportation."

And in *United States v. Rock Royal Co-Operative* (1939), 307 U. S. 533, the Court said (pp. 568-569):

> "But where commodities are bought for use beyond state lines, the sale is a part of interstate commerce."

It is implicit in the words and form of these expressions that the Court treats the *Dahnke-Walker* definition of interstate commerce as firmly imbedded in the law of the land.

This Court has expressly stated that the limitation imposed by the commerce clause applies *alike* to the state's taxing power and to other types of 'interference"—which must include the various kinds of "regulations." In *Minnesota v. Blasius* (1933), 290 U. S. 1, after citing the *Dahnke-Walker* case and others as "illustrating the practical conception of interstate commerce as a flowing stream from one state to another, formed by a regular course of business," the Court said (pp. 8-9):

> "The States may not impose direct burdens upon interstate commerce, that is, *they may not regulate or restrain* that which from its nature should be under the control of the one authority and be free from restriction save as it is governed in the manner that the national legislature constitutionally ordains. *This limitation applies to the exertion of the State's taxing*

> *power as well as to any other interference by the State with the essential freedom of interstate commerce.* States cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or *upon the receipts, as such, derived from it.*"

And as the Circuit Court of Appeals indicates in its opinion, in no instance has this Court, in determining whether interstate commerce existed or did not exist, ruled differently because the ultimate point involved related to a tax or to a regulation. Where facts like those in the *Dahnke-Walker* case exist, *there is* interstate commerce. The facts here make this a stronger case of interstate commerce.

In *Eastern Air Transport Co., Inc. v. South Carolina Comm., et al.* (1932), 285 U. S. 147, the state tax was expressly laid on the local privilege of engaging in the business of selling oil, gasoline, etc., and there was no possibility of the gasoline being anywhere subject to an additional tax of the multiple character, because it was not in interstate commerce.

In *Superior Oil Co. v. Mississippi* (1930), 280 U. S. 390, heavily relied on by petitioners, the action was by the State of Mississippi to collect a gasoline tax. The gasoline was sold by the Oil Company to packers of sea food. The transaction was complete when the gasoline was delivered at the packers' own wharf. The packers loaded the gas on their own fishing boats, carried it to fishermen in the neighborhood of Grant's Pass, Louisiana, and there sold it. The Oil Company, on making delivery to the packers at the wharf, took back from the packers a so-called bill of lading signed by the master of the boat. This instrument recited that the oil continued to be the property of the Oil Company until delivered to packers' consignee. This was not true. Nor was there any actual consignee

at the destination named in the bill of lading. The thing was simply rigged up for the purpose of trying to make interstate a transaction which was not. The seller and purchaser were both domiciled in Mississippi, and the sale, the delivery, and the payment were made in Mississippi. The pretended shipment from wharf to the fishermen was just a device to evade the tax. Mr. Justice Holmes spoke very moderately when he said "the document (bill of lading) seems to have had no other use than, as the Supreme Court of Mississippi said, to try to convert a domestic transaction into one in interstate commerce." The Court further said:

> "But here the gasoline was in the hands of the purchaser to do with as it liked, and *there was nothing that in any way committed it to sending the oil to Louisiana* except its own wishes." (280 U. S. at 395.)

In the instant case, sale of the ties was conditioned upon their being shipped to Finney, Ohio. Failure of respondent to ship or of the railroad to transport them there would have been a breach of the contracts.

Conclusion

The decision of the Circuit Court of Appeals is correct. It is fully supported by the facts and the law. There is no conflict with decisions of this Court. The decision should be affirmed.

Respectfully submitted,

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March 22, 1941.

APPENDIX

Statutes

Chapter 50, Indiana Acts 1933
(Ind. Stat. Ann. (Burns) 1933, Sec. 64-2601 et seq.)

AN ACT to provide for the raising of public revenue by imposing a tax upon the receipt of gross income, to provide for the ascertainment, assessment and collection of said tax, and to provide penalties for the violation of the terms of this Act, and declaring an emergency.

Section 1. Be it enacted by the general assembly of the State of Indiana, That this Act may be cited as the "Gross Income Tax Act of 1933."

. . . .

Sec. 2. There is hereby imposed a tax, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the entire gross income of all residents of the State of Indiana, and upon the gross income derived from sources within the State of Indiana, of all persons and/or companies, including banks, who are not residents of the State of Indiana, but are engaged in business in this state, or who derive gross income from sources within this state, and shall be in addition to all other taxes now or hereafter imposed with respect to particular occupations and/or activities. . . .

Sec. 3. The tax hereby provided for shall be imposed at the following rates:

. . . .

(c) Upon the entire gross income of every person engaged in the business of retailing of any tangible commodity or commodities not specifically mentioned in subsection (d) of this section, one per cent.

. . . .

Sec. 6. There shall be excepted from the gross income taxable under this Act:

(a) So much of such gross income as is derived from business conducted in commerce between this state and other states of the United States, or between this state and foreign countries, to the extent to which the State of Indiana is prohibited from taxing under the Constitution of the United States of America. . . .

Sec. 12. (a) . . . Any person improperly charged with any tax provided for under this Act, and required to pay the same, may recover the amount improperly collected, together with interest, in any proper action or suit against the department of treasury; and the circuit court of the county in which the taxpayer resides or is located shall have original jurisdiction of any action to recover any tax improperly collected. . . .

Amending Act of 1937

Chapter 117, Acts 1937, Effective April 1, 1937

(Ind. Stat. Ann. (Burns) 1933, Pocket Supp., Sec. 64-2601, et seq.)

AN ACT to provide for the raising of public revenue by imposing a tax upon the receipt of gross income, to provide for the ascertainment, assessment, and collection of said tax, and to provide penalties for the violation of the terms of this act, and declaring an emergency.

Section 1. Be it enacted by the General Assembly of the State of Indiana, That this act may be cited as the "Gross Income Tax Act of 1933."

. . . .

Sec. 2. There is hereby imposed a tax upon the receipt of gross income, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the receipt of the entire gross income of all persons resident and/or domiciled in the State of Indiana, except as herein otherwise provided; and upon the receipt of gross income derived from activities or businesses or any other source within the State of Indiana, of all persons who are not residents of the State of Indiana, and shall be in addition to all other taxes now or hereafter imposed with respect to particular privileges, occupations, and/or activities. Said tax shall apply to, and shall be levied and collected upon, the receipt of all gross income received on or after the 1st day of May, 1933, with such exceptions and limitations as may be hereinafter provided.

Regulations

Promulgated by Gross Income Tax Division
July 31, 1934

Article 1

Definitions

. . . .

Reg. 6. Gross Income consists of the gross receipts as hereinafter defined, from any business, together with any other moneys (not including borrowed money) or properties received from any and all other sources and from other activities, without deduction for expenses, for costs of goods sold, or amount of property left on hand.

Reg. 7. Gross Receipts. The amount received either in money or property, or both, from a transfer of possession of any tangible or intangible property, personal service, interest, discount, rents, royalties, bonuses, fees, commissions and other emoluments however designated.

Article 2

General Scope and Application of Tax

The Gross Income Tax Act of 1933 is primarily and in effect a gross receipts tax applying to the gross receipts of every taxpayer under the Act from all sources without allowances or deductions for costs, expenses or dependents, and is, therefore, in no way a net income tax.

It applies to income from sales of all kinds of property or commodities in business and in this case is measured by the gross income derived from such sales. In this respect and to this extent it operates as a sales tax. There are not two separate and distinct laws in Indiana—that is, a gross income tax and a sales tax—but whatever elements of a sales tax there might be are embodied in and made a part of the gross income tax law. . . .

Reg. 16. *Effective Date of Law.* Tax shall apply to and shall be levied and collected upon all gross income received on or after the first day of May, 1933, regardless of the fact that such income was earned or became due prior to that date.

Reg. 17. *To What Tax Applies.* The entire gross income from sales, salaries, wages, rentals, commissions, dividends, royalties, and from any source whatever, of every person named in Reg. No. 1 and Reg. No. 2 in excess of $1,000 a year, except such income as is specifically excepted under the Act or hereinafter designated as being exempt from taxation.

Article 3

Income and Rates

Reg. 21. *Income from Sales.* Gross income derived from sales is taxable at the following rates:

From sales made to consumer—1% (See Reg. No. 9-c)

From sales made for resale—¼ of 1% (See Reg. No. 9-d)

. . . .

Article 45

Reg. 193. . . . 8—*Sale of Tangible Personal Property.* Persons resident and/or domiciled in Indiana receiving proceeds from the sale of personal property in states other than Indiana will be taxable thereon unless it can be shown that such personal property is an integral part of a business regularly engaged in by such person and which has its legal situs outside of Indiana. (Approved Dec. 31, 1935).

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CLERK

Supreme Court of the United States

October Term, 1940

No. 654

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. CLIFFORD TOWNSEND, PETER F. HEIN, LAWRENCE F. SULLIVAN, as and constituting the Board of Department of Treasury of the State of Indiana,

Petitioners,

vs.

THE WOOD PRESERVING CORPORATION,

Respondent,

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S MEMORANDUM ON ADDITIONAL AUTHORITY

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DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, ET AL.,

Petitioners,

vs.

THE WOOD PRESERVING CORPORATION,

Respondent,

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S MEMORANDUM ON ADDITIONAL AUTHORITY

Just before the oral argument, petitioners filed an additional authority. In the argument, many of the questions of the Court were directed to the matter of allocation under Section 9(a), Ch. 50, Acts 1933 cited for the first time. The Section was not relied upon (a) before the Department on the claim for refund; or (b) before the District Court in either the pleadings, brief or argument; or (c) before the Circuit Court of Appeals in either the brief or argument.

Several answers to the application of this Section, which, because of the lateness of the hour of the service of the

additional authority on the respondent, were not well stated to the Court in oral argument nor in the typewritten memorandum filed by respondent immediately after the argument. We, therefore, wish to present briefly the points which relate to Section 9(a).

I. The Section was not in force when the assessment in this case was made.

Section 9(a) is a part of Ch. 50, Acts of 1933. That Act was amended completely, section by section, in 1937, and on April 1, 1937, these amendments became effective (Chapter 117, Acts of Indiana 1937). Section 10 of the '37 Act corresponds to Section 9 of the 1933 Act, but the italicized proviso in Section 9(a) set forth in the Petitioner's Additional Authority *was omitted from the 1937 Act.* Therefore, from and after April 1, 1937, this Section was no longer in force. The assessment made in this case against respondent was not made until August 6, 1937 (Record p. 21), over four months after the proviso clause as to apportionment had been repealed. The petitioners therefore rely upon a provision of the law not in force at the time of the assessment. *No provision for apportionment of any kind is contained in the 1937 Act.*

II. Section 9(a) of Chapter 50 of the Acts of 1933, while it did remain in force from May 1, 1933 to April 1, 1937, was never applied by the Department.

No regulations were ever issued providing for non-residents' report of their entire gross income and an allocation under the Section, nor did the forms provided by the Department make provision for allocation. The only form providing for allocation ever issued by the Department was Schedule E, Form 10, which provided

for the report of gross income from separate locations of business within the State. It was used for such typical operations as chain stores, oil companies and the like operating at several separate locations within the State. It was not used for or required to be filed by corporations in the situation of respondent. Corporations doing a national business were not required to report all of their gross income and appropriation to Indiana.

III. The Section was generally accepted as applying primarily to receipts derived from interstate business, and it was not at any time enforced.

Prior to the first collection date under the Gross Income Tax Act, which was July 1, 1933, the case of *J. D. Adams Manufacturing Co. v. Storen* (304 U. S. 307) was filed (June 10, 1933) in the Superior Court of Marion County, and that Court on June 28, 1933 entered a judgment holding that the Gross Income Tax Act could not be applied to receipts from interstate commerce (a decision ultimately affirmed by this Court). Immediately, the Department issued Temporary Regulation 190, which provided in part as follows:

> "Any taxpayer engaged in the business of manufacturing, wholesaling, jobbing or retailing who has gross receipts derived from interstate sales will not be required to include such receipts in any return already filed or to be filed prior to the time that the Supreme Court of Indiana shall render a decision in the case now pending, wherein J. D. Adams Manufacturing Company is plaintiff and the Department of Treasury is defendant."

Reporting of interstate receipts was thus deferred. Respondent has always claimed that the gross receipts here involved were from such a source. The *Adams case* was

not decided by the Supreme Court of Indiana until after the legislature of the State had repealed Section 9(a) as stated above. The Supreme Court of Indiana judgment was entered on April 30, 1937. Immediately after the Supreme Court decision, the Department of Treasury issued Temporary Regulation 3801, which revoked the Temporary Regulation 190 quoted above, and which provided that all taxpayers should report their "gross receipts" derived from "transactions in interstate commerce," but deferred the payment of the tax on such receipts until the decision of the *Adams case* by this Court. Immediately after the adoption of Temporary Regulation 3801, the Department of Treasury of the State of Indiana for the first time provided a form for the reporting of income derived from sources outside of the State, namely, in interstate commerce, and form 23(a) provided for a reporting of all income from May 1, 1933 to March 31, 1937 on the form.

It was undoubtedly upon the information received from this return that the Department of Treasury in this case made the assessment against this respondent on August 5, 1937.

The taxpayer in this case, therefore, was never required to report or to allocate income at any time while Section 9(a) was in force.

Further, it might be observed that if the Department had felt the taxpayer had intentionally disregarded Section 9(a) if it did apply, then the Department should have assessed the 10% penalty provided for in Section 10(c) of Ch. 50 of the Acts of 1933 which is mandatory in the event of intentional disregard "of authorized rules and regulations." No penalty was ever assessed in this case and it should be obvious that the Department regarded

that no violation of the provisions of this Section existed in the case of this respondent.

IV. No allocation ever permitted by Department.

The Department has never allocated receipts under Section 9(a). The Department of Treasury has always taken the position that the Act provided for a tax upon the *"entire receipts of the taxpayer."* It has relied upon the language of Section 3 of the Act which provides the rates at which the tax is to be assessed. Each of the several sub-sections of this Section repeats the phrase that the tax is imposed *"upon the entire gross income"* of the persons divided according to various classifications. This identical phrase *"upon the entire gross income"* is repeated five times in this Section. As recent as March 25, 1941, the Department of Treasury, in a written order in the case of *Koppers Company, Inc.*, an affiliated corporation of this respondent, in a case where proof was submitted as a basis for allocation, the Department ruled:

> "The Department is, therefore, compelled to hold that the taxpayer corporation was engaged in the performance of a construction contract within the State of Indiana, and the *entire gross receipts* therefrom are properly taxable under the provisions of the Gross Income Tax law, and there can be no division or separation of the gross receipts . . ."
>
> (Ruling Hearing Judge, Department of Treasury, March 25, 1941; taxpayer Koppers Company, Inc.; Account No. 93-23311).

To this position, the Department has always strictly adhered, and its public announcement of this position is apparent from the report on the adoption of the Uniform Regulation proposed by state tax enforcement officers following the decisions of the *McGoldrick v. Berwind-White*

Coal Mining Co. case, 309 U. S. 33, where Indiana tax officials refused to adopt the regulations because, as they stated in that ruling:

> "Under the Indiana Gross Income Tax Act we doubt if taxation can be predicated on mere delivery in the state and hence we attempt to tax foreign corporations on sales made into Indiana only when they are licensed in Indiana and maintain substantial offices or establishments in the state which are responsible for the sales being made."
>
> (November 29, 1940) (C. C. H. Interstate Sales Tax Service, par. 15-094).

The Courts of Indiana have given the Department support in the position. In fourteen cases decided by the appellate courts of the state, the Act has been treated as imposing a tax upon *total receipts* of the taxpayer without apportionment. In *Sioren v. Jasper County Farm Bureau Co-op. Assn.*, 103 Ind. App. 77, 81 (Dec. 17, 1937), the Appellate Court of the State summarized the position:

> "The act is known as the *Gross Income* Tax Act, *gross* having been defined to mean all. The act provides that there shall be imposed a tax 'measured by the amount or volume of gross income' and the term gross income is *specifically defined* in the act to mean 'the gross receipts of the taxpayer received as compensation' and that 'derived from trades, *businesses or commerce* and the gross receipts proceeding or accruing . . . and all receipts' and further with the evident expressed intention of the idea that the word gross should include everything added, in another section (in the classification of rates) that the tax shall be imposed upon the '*entire* gross income.' Thus it is evident that the result intended to be accomplished by this act was the taxation of 'the entire gross income' of those not specifically exempted." (Court's italics.)

V. The gross income tax is levied on total receipts of the taxpayer.

In the oral argument, the Attorney General admitted that the Gross Income Tax Act was modeled after the West Virginia law, but there are significant differences which go to the question of apportionment under the due process clause and to the question of jurisdiction to tax under that same clause. Undoubtedly the framers of the Indiana law had the West Virginia law before them, but the differences which were made by the framers deliberately in the drafting of the Indiana law are significant. The title of the West Virginia law, so far as pertinent here, is:

> "An Act to provide for the raising of additional public revenue by . . . providing for and imposing *a privilege tax upon the exercise of certain privileges in the State*, . . ." (Ch. 33, Laws of West Virginia, 1933).

Section 2 of this Act imposed a tax solely on "the value of the entire production manufactured" regardless of the point of delivery, thus bringing the law squarely within *American Manufacturing Co. vs. City of St. Louis* (1919), 250 U. S. 459, which was specifically held not applicable to the Indiana law by this Court in the *Adams case*. Also, the word "privilege" is used thirty-seven times, and the word "license" nine times, and the word "value' nine times, in the Virginia law, whereas in the Indiana law not one of these words is used a single time. The title of the Indiana Act is:

> "An Act to provide for the raising of public revenue by imposing a tax upon the receipt of gross income . . ."
>
> (Ch. 50, Acts of Indiana 1933.)

There are several other Acts of other States which used gross receipts as the measure of a "privilege" tax, but all of those laws have titles similar to the West Virginia statute and are couched clearly in the language of privilege just as in the case of the West Virginia statute. (*Cf.* Ch. 7, Laws of Arizona 1933; Ch. 119, Laws of Mississippi 1934; Ch. 7, Laws of New Mexico 1934; Ch. 14, Laws of South Dakota 1933; Ch. 191, Laws of Washington 1933). In all of these laws, the taxes are clearly levied upon a "privilege," are limited to the income from the exercise of that privilege, and licenses are granted for the exercise of the privilege, all of which the framers of the Indiana law carefully deleted. The tax in Indiana is imposed upon "all gross receipts of the taxpayer," whether derived from any business or occupation. It is a tax purely and simply upon all gross receipts of the taxpayer. An examination of these other laws makes it apparent that the Legislature of Indiana deliberately chose this form of tax, and there are many obvious advantages. Total receipts of the taxpayer, whether derived from his business or occupation, may be taxed, and even those who have no business or occupation may be taxed if they but have gross receipts.

The Act is, therefore, what this Court has said it was in the *Adams case.* As Justice Roberts said in that case:

> "The title of the Act declares that it is a revenue measure imposing a tax upon 'the receipt of gross income' . . . The regulations issued by the Department of Treasury, pursuant to authority granted by the Act, treat the exaction as a tax on gross receipts, and the Attorney General says in his brief that it is a privilege tax upon the receipt of gross income. We think this is a correct description. (*J. D. Adams Manufacturing Co. vs. Storen* (May 16, 1938), 304 U. S. 307, 309, 311.)

The Legislature has affirmed this construction by the amendment of the Act approved March 8, 1941 by the Legislature, which leaves the title still reading:

"An Act . . . imposing a tax upon the receipt of gross income . . ." (Ch. 40, Acts of Indiana 1941).

Conclusion

We therefore respectfully submit that for the foregoing reasons, Section 9(a) of Ch. 150, Acts of 1933, in no way affects the questions before this Court. It should be apparent that petitioners have never seriously considered that it did affect the case, because the question has never been raised in the three and one-half years that this case has been litigated until immediately prior to the call of the docket of this case on Monday, when the additional authority was filed with this Court.

We further submit that the Indiana Gross Income Tax Act, differing from all other State Laws, is purely a tax on the "entire gross receipts" of the taxpayer, and has been so construed by the Department, by the Courts of Indiana, and by this Court. In the application of this Act, this Court must presume that the Legislature has deliberately chosen a total gross receipts tax because of the advantage it has over occupation taxes measured by gross receipts. Therefore in the application of constitutional provisions, the inherent limitations of such a tax apparent from the briefs and the argument in this case must be presumed to have been weighed by the Legislature of the State and accepted by it. The courts should not rewrite the acts when the Legislature has failed to do so!

We, therefore, submit that—(a) there is a total lack of power in the State of Indiana to tax because the receipt was outside of the State (without effort at evasion (R. 80));

(b) even if there is power to tax, the tax has been l
without apportionment on activities both within and
out the state; and (c) the tax is a tax upon gross rec
capable of multiplication in the same form by Ohio, P
sylvania, Delaware, and all other States which the
merce may touch, and is squarely within the decisi
this Court in the *Adams case*.

Respectfully submitted,

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April 8, 1941.

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SUPREME COURT OF THE UNITED STATES.

No. 654.—October Term, 1940.

Department of Treasury of the State of Indiana, et al., etc., Petitioners,
vs.
The Wood Preserving Corporation.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[April 28, 1941.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

This suit was brought by respondent, The Wood Preserving Corporation, to recover taxes collected from it by the Department of Treasury of the State of Indiana under the Indiana Gross Income Tax Act of 1933. The District Court denied recovery and its judgment was reversed by the Circuit Court of Appeals upon the ground that the taxes were invalid under the Federal Constitution as laid upon income received outside the State and as constituting an unlawful burden upon interstate commerce. 114 F. (2d) 922. In view of the asserted conflict with applicable decisions of this Court, certiorari was granted. February 3, 1941.

The facts were found in accordance with the stipulation of the parties. Respondent is a Delaware corporation with its principal place of business at Pittsburgh, Pennsylvania. It is qualified to do business in Indiana but has no agents or employees within that State except as specified. Respondent is engaged in the business of treating railroad ties by creosoting them and also in the business of purchasing and selling ties. It does not, however, sell ties save to those with whom it has a contract for treatment.

The taxes in question were for the years 1934, 1935 and 1936. The taxes were laid upon respondent's gross receipts from the sale of ties to the Baltimore and Ohio Railroad Company in accordance with certain contracts. One contract required the Railroad Company to deliver for treatment 600,000 ties annually to a treatment plant at Finney, Ohio, belonging (through a subsidiary) to respondent. The other provided for the sale of raw ties to the Rail-

road Company, delivered f. o. b. cars on the railroad tracks; also for treatment of ties at another plant to be operated by respondent (under lease from the Railroad Company) in West Virginia. A supplemental agreement required respondent to ship all ties delivered to the railroad in territory west of the Ohio River, including Indiana, to the plant at Finney, Ohio, for treatment. Respondent sold to the Railroad Company no ties that were not to be treated at one or the other of its plants before use.

The course of business, so far as material here, was as follows: Respondent itself produced no ties in Indiana. Requisitions for ties were issued from the Railroad Company's office in Baltimore and were accepted at respondent's office in Marietta, Ohio, by telephone or mail. Respondent then procured the ties from local producers in Indiana through communications by telephone or mail from its Marietta office. The Indiana vendors delivered the ties at loading points on the railroad in Indiana. When the ties were ready, an inspector for the Railroad Company and respondent's agent met at the loading point in Indiana, and as the ties were examined with respect to compliance with specifications, those accepted by the railroad inspector were loaded on freight cars furnished by the Railroad Company at the loading point. The inspection and loading were simultaneous. Respondent paid the Indiana producers only for ties which were thus accepted. Respondent's agent made out bills of lading with respondent as consignor and the Railroad Company's Chief Engineer of Maintennace at Finney, Ohio, as consignee, and the ties were carried to Finney, Ohio, for treatment. Respondent paid no freight to the Railroad Company for that transportation. Respondent's office at Marietta mailed weekly invoices to the Railroad Company at its Baltimore office for the ties sold and delivered to the Railroad Company and monthly reports of such invoices were made to respondent's main office at Pittsburgh. All payments for ties were made to respondent's Pittsburgh office and were there deposited in bank.

The taxes in question were laid by the Indiana authorities on the receipts which respondent derived from the sale of the untreated ties. These receipts did not include charges for the creosoting treatment; those charges were separately billed by respondent's subsidiary when the treatment was completed.

Section 2 of the Indiana Taxing Act of 1933, the text of which is set forth in the margin,[1] provides for a tax upon gross income "derived from sources within the State of Indiana" of all non-resident persons and corporations. The court below has held that under this statute the thing taxed was "the receipt of gross income" and as the income in question was received by respondent in Pennsylvania, it was beyond the jurisdiction of Indiana; that, if the contrary theory of the taxing officials was sound, still the tax was invalid because no method was provided for allocating the tax to the income derived from that part of the business transacted within Indiana; and, further, that the transactions in question "were had in interstate commerce", that the tax discriminated against that commerce and for that reason was void.

We think that the court was in error in each of these conclusions.

As to the first point, the court relied upon our decision in *Adams Manufacturing Company* v. *Storen*, 304 U. S. 307. That was a case under the same taxing act of Indiana, but there the tax was applied to gross receipts derived by an Indiana corporation from sales in other States of goods manufactured in Indiana. We observed that the tax is not an excise for the privilege of domicile "since it is levied upon the gross income of non-residents from sources within the State". The point of the decision was that "the tax is what it purports to be,—a tax upon gross receipts from commerce", and that the tax was there laid upon receipts from sales to customers in other States and abroad which constituted interstate and foreign commerce. *Id.*, pp. 310, 311.

The present question is as to the validity of the tax upon receipts "derived from sources within the State",[2] that is, under Section 2

[1] Section 2 of Chapter 50 of the Acts of 1933 of Indiana is as follows:

"Sec. 2. There is hereby imposed a tax, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the entire gross income of all residents of the State of Indiana, and upon the gross income derived from sources within the State of Indiana, of all persons and/or companies, including banks, who are not residents of the State of Indiana, but are engaged in business in this state, or who derive gross income from sources within this state, and shall be in addition to all other taxes now or hereafter imposed with respect to particular occupations and/or activities. Said tax shall apply to, and shall be levied and collected upon, all gross incomes received on or after the first day of May, 1933, with such exceptions and limitations as may be hereinafter provided". 11 Burns Indiana Statutes, sec. 64-2602.

[2] See Miles v. Department of Treasury, 209 Ind. 172, 188; Indiana Creosoting Co. v. McNutt, 210 Ind. 656, 663, 664.

of the Act, from activities which petitioners insist were intrastate. If petitioners are right in this contention there can be no doubt that Indiana had authority to lay the tax. *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, 120, 121; *Bowman* v. *Continental Oil Co.*, 256 U. S. 642, 648, 649; *National Leather Co.* v. *Massachusetts*, 277 U. S. 413, 423; *Hans Rees' Sons* v. *North Carolina*, 283 U. S. 123, 134; *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 149, 161; *Dravo Contracting Co.* v. *James*, 114 F. (2d) 242, 247. Compare *Wisconsin* v. *J. C. Penney Co.*, No. 46 (decided December 16, 1940. In that view, it cannot be said that respondent had a constitutional right to escape that burden by arranging to have the proceeds of its intrastate transactions paid to it in another State. *Underwood Typewriter Co.* v. *Chamberlain, supra*, p. 120; *Continental Assurance Co.* v. *Tennessee*, 311 U. S. 5.

Further, as the sole subject of the challenged tax is the income derived from respondent's sales to the Railroad Company there is no occasion for apportionment. The creosoting operations in Ohio, and the income derived from them, were not involved. And the fact that the ties which were sold to the Railroad Company were purchased by respondent through orders given to the Indiana producers from respondent's Marietta office cannot affect the authority of Indiana to tax the receipts from intrastate activities of respondent in its dealings with the Railroad Company. *Woodruff* v. *Parham*, 8 Wall. 123, 140; *Banker Brothers* v. *Pennsylvania*, 222 U. S. 210; *Wiloil Corporation* v. *Pennsylvania*, 294 U. S. 169, 175.

As to these dealings, it appears that respondent received in Indiana the ties it purchased from the local producers and that respondent sold and delivered these ties in Indiana to the Railroad Company. The fact that the delivery by the producers to respondent and respondent's delivery to the Railroad Company took place at the same time is not important. Respondent was in Indiana acting through its agent at the designated points on the railroad line. The Railroad Company was at the same points represented by its inspector. The ties brought there by the producers were then examined and those found by the inspector to be in accordance with specifications were accepted. In these transactions, respondent through its agent at once accepted from its vendors the ties which the Railroad Company found satisfactory and then and there sold and delivered these ties to the Railroad Company. These

were local transactions,—sales and deliveries of particular ties by respondent to the Railroad Company in Indiana. The transactions were none the less intrastate activities because the ties thus sold and delivered were forthwith loaded on the railroad cars to go to Ohio for treatment. The contract providing for that treatment called for the treatment of ties to be delivered by the Railroad Company at the Ohio plant, and the ties bought by the Railroad Company in Indiana, as above stated, were transported and delivered by the Railroad Company to that treatment plant. Respondent did not pay the freight for that transportation and the circumstance that the billing was in its name as consignor is not of consequence in the light of the facts showing the completed delivery to the Railroad Company in Indiana. See *Superior Oil Co.* v. *Mississippi*, 280 U. S. 390.

We find no ground for saying that in taxing the receipts from these local transactions Indiana has exceeded its constitutional authority by taxing interstate commerce or discriminating against it.

The judgment of the Circuit Court of Appeals is reversed and that of the District Court is affirmed.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.

END